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No. .

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

DANCO, INC. AND BENJAMIN GUILIANI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. § 1981 permit independent contractors, as opposed to employees, to bring hostile work environment claims?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are identified in the caption of the case. In accordance with S. Ct. R. 29.6, petitioner Wal-Mart Stores, Inc. states that CIFRA, S.A. de C.V. is a non-wholly owned subsidiary. Petitioner has no parent companies.

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PETITION FOR A WRIT OF CERTIORARI

Enacted as part of the Civil Rights Act of 1866, section 1981 of Title 42 has long barred racial discrimination in the "mak[ing] and enforc[ing] [of] contracts." Section 1981 undoubtedly permits race-discrimination claims brought by independent contractors regarding the enforcement or termination of a contract. And section 1981 undoubtedly permits employees to bring hostile work environment claims, *see Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), against their employers. But does the provision permit both: May an independent contractor in other words, as opposed to an employee, bring a hostile work environment claim?

As a matter of statutory interpretation, logic and common sense, the answer is "no." Because the subordinate relationship that makes a hostile work environment claim cognizable is missing in an independent contractor setting, and because the only party who generally has an enforceable contract in that setting—the corporation—lacks standing to bring such actions, the statute does not permit them. Nor, in the initial 133 years of the statute's existence, did any court, whether trial or appellate, state or federal, rule to the contrary. In recently becoming the first court to reach a different result, the lower court not only overlooked settled principles of statutory construction, but also issued a ruling that is laden with opportunity for broad misapplication and that exacerbates a conflict in the lower courts regarding the standing of corporations to bring such claims. For these reasons and those elaborated below, the Court should grant the writ.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the First Circuit was issued on May 12, 1999, was corrected by an errata sheet on June 11, 1999, and is reported at 178 F.3d 8 (1999). The opinion that appears at 1a of the appendix reflects

the corrected version. The order of the United States District Court, District of Maine, denying Wal-Mart's motion for summary judgment on the section 1981 claims, is unreported and appears at 18a of the appendix. And the order of the United States District Court, District of Maine, denying Wal-Mart's post-trial motion for judgment as a matter of law, is unreported and appears at 37a of the appendix.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the First Circuit was entered on May 12, 1999. (App. 1a). Jurisdiction exists under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1981 provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT

1. In 1988, Benjamin Guiliani, a Mexican-American, founded Danco, which he later incorporated as Danco, Inc. The purpose of the company was to maintain and clean the parking lots of various retail enterprises.

2. On September 15, 1994, Danco entered into a contract with Wal-Mart Stores, Inc. ("Wal-Mart") to perform parking lot maintenance for a Wal-Mart store located in Augusta, Maine. The agreement required Danco to remove litter from the parking lot three times a week and to remove sand from the lot once a week. While performing the agreement, Danco alleged that its employees were subjected to three racially-motivated incidents.

a. In October 1994, an individual spray-painted the words "White Supremacy" on the Wal-Mart parking lot. (App. 2a). Guiliani claimed that he saw a Wal-Mart associate, Bob Amadei, walking toward the store shortly before he first saw the painted words, while his eight-year-old son claimed that he saw Amadei at the same spot with a can of spray paint just a few seconds before spotting the graffiti. Amadei denied having anything to do with the graffiti. (*Id.*). Guiliani brought the graffiti to the attention of the store manager, Curtis Scheffe, who agreed to investigate the incident and to have the graffiti removed. (*Id.*). While Scheffe testified that he ordered the graffiti to be removed immediately, others testified that it remained there for over a month. (*Id.*). Neither Scheffe nor anyone else involved in the investigation ultimately determined whether a Wal-Mart employee painted the offending words. (App. 2a-3a).

b. On October 14, 1994, Guiliani claimed that an off-duty employee, Scott Hamlin, told him: "I don't like your kind." (App. 3a, 23a). When asked what he meant, Hamlin allegedly said "Puerto Ricans." Guiliani also testified that Hamlin verbally threatened and pushed him. Guiliani called the Augusta police department and reported the incident to Scheffe who agreed to investigate the matter. (App. 3a). The investigation failed to determine who was responsible for the incident. (*Id.*).

c. In November 1994, Guiliani alleged that Hamlin, again while off duty (App. 23a), yelled a racial slur at him from a passing vehicle. (App. 3a). No other incidents of harassment occurred.

3. In January 1995, Wal-Mart hired a new manager, James Helterbrake, to run the Augusta store. Soon thereafter, he told Danco that he was unhappy with its performance and on January 30, 1995, gave notice that the company's services would be terminated. (App. 3a). Nonetheless, a few weeks later, Wal-Mart and Danco entered into a new contract requiring Danco to sweep sand twice a week from the parking lot. (*Id.*).

4. In February 1995, after making several oral complaints, the Maine Department of Environmental Protection sent a letter to Wal-Mart informing it that the sand removal from the parking lot was inadequate and inconsistent with the special site approval permit for the parking lot. (App. 4a). As a result, Wal-Mart terminated Danco's contract at the end of March 1995. *Id.* At the time of the termination, the Maine Department of Environmental Protection was considering taking action against Wal-Mart to enforce the permit conditions for the parking lot and to prevent additional sand from washing into a nearby brook. (App. 2a, 4a).

5. a. In March 1997, two years after the termination, Guiliani and Danco sued Wal-Mart, alleging a violation of § 1981 as well as several State laws, including breach of contract, unjust enrichment, negligence, intentional infliction of emotional distress and denial of public accommodations. (App. 4a). Plaintiffs sought to present both a wrongful termination and a hostile work environment claim to the jury under § 1981.

b. Prior to trial, Wal-Mart moved for summary judgment arguing that the § 1981 claim should be dismissed as a matter of law. (App. 37a). The district court denied the motion. (App. 21a-24a). At the close of plaintiffs' case, Wal-Mart moved for a directed verdict, arguing among other things that the § 1981 claim should be submitted to the jury only on wrongful termination, not hostile work environment, because an independent contractor cannot maintain a hostile work environment claim under the statute. (App. 4a, 39a-40a). Though noting that there were no reported cases recognizing such a claim for independent contractors (App. 39a), the district court denied Wal-Mart's motion and submitted both theories of recovery to the jury. (App. 39a-40a). In doing so, the judge gave jury instructions that "would be standard for a Title VII hostile work environment claim, but omitted any references to 'employee' (because of Danco's independent contractor status)." (App. 5a).

6. The jury ruled in favor of Wal-Mart on the discriminatory termination claim under § 1981. (App. 5a). But it found for plaintiffs on the § 1981 hostile work environment theory, awarding $650,000. The district court granted a remittitur reducing the award to $300,000. (*Id.*).

7. The First Circuit (Torruella, *Boudin*, Stahl) affirmed. The court acknowledged (App. 7a-8a) that the 1991 amendments to § 1981 responded to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which denied a hostile work environment

claim brought by an employee, not an independent contractor. And it acknowledged that the legislative history of the 1991 amendments referred only to extending the statute to claims by employees, as opposed to independent contractors. (App. 8a-9a). Still, the First Circuit agreed that independent contractors could bring hostile work environment claims, and could do so under § 1981. "One could say," the court noted, "that avoiding a hostile work environment claim is an implicit contractual benefit or term that exists for employees but not independent contractors." (App. 8a). But it found that "[o]n the face of the statute, nothing forbids such a claim." (*Id.*). It did not find relevant the omission of the term "independent contractor" in the legislative record to the 1991 amendments, reasoning that "most cases involve employees rather than independent contractors." (App. 8a-9a).

In addressing the "considerable" "problems" of "liability run amok if a company is made responsible not only to protect its own employees against racial harassment in the workplace but also to protect all of the contractors with whom the company may deal" (App. 9a), the court said that only corporations, not their employees, could bring such claims. "Nothing in section 1981," the court noted, "provides a personal claim" by employees of such contractors. (App. 9a-10a). But because "[a] corporation ordinarily carries out its activities through its employees," the court felt that "work-site racial discrimination against Danco's employees could amount to racial discrimination against Danco." (App. 10a).

8. Wal-Mart petitioned for rehearing and hearing en banc. It pointed out that the panel's analysis demonstrated that neither Guiliani nor Danco had Article III standing to assert the hostile work environment claim—first because Guiliani, as the panel correctly understood, was not the contracting party and therefore had no rights under § 1981, and second because Danco, as the panel failed to recognize, could not bring a hostile work

environment claim in its capacity as a corporation. Nonetheless, on June 11, 1999, the First Circuit denied the petition. (App. 45a).

REASONS FOR GRANTING THE WRIT

In the 133 years since § 1981 came into existence and in the 13 years since the Court first recognized hostile work environment claims, *see Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), no other court has issued a holding merging these separable and separately-conceived concepts—hostile work environment and independent contractor status. The reason is straightforward: The qualities of control and dependence that make a hostile work environment actionable in the context of an employer-employee relationship do not exist in the setting of an agreement between two independent businesses. Whether in the context of Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or even § 1981, hostile work environment claims have long been grounded in the unique dynamics of an employee-employer relationship and that relationship alone. While § 1981 claims may be brought for racially-motivated terminations of contracts, Danco in this instance was no more entitled to bring a hostile work environment claim against Wal-Mart than Wal-Mart was entitled to do so against Danco.

The court of appeals' sudden expansion of § 1981 liability warrants review now rather than later. The analysis is wrong and disregards several established principles of statutory interpretation announced by this Court. The decision exacerbates a burgeoning conflict in the lower courts regarding the standing of corporations to bring discrimination claims on behalf of their individual employees. And, left unreviewed, the decision may present, as the court of appeals itself acknowledged (App. 9a), the "considerable" "problem" of "liability run amok if a company is made responsible not only

to protect its own employees against racial harassment in the workplace but also to protect all of the contractors with whom the company may deal." Nor is the answer to this quandary to ask "Congress to fix" these "problems." (*Id.*). Contrary to the court of appeals' suggestion, it is first to ask this Court to "fix" the lower-court's flawed analysis, which is just what this petition does.

I. THE COURT OF APPEALS MISCONSTRUED § 1981 AND DISREGARDED SEVERAL ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION IN DOING SO.

1. The Terms Of § 1981 Do Not Reach Hostile Work Environment Claims By Independent Contractors.

The operative words of § 1981 from 1866 to the present have been, and continue to be, utterly silent about the application of the statute to hostile work environment claims between independently contracting businesses. The right to be free of racial discrimination in the context of "mak[ing] and enforc[ing] contracts," 42 U.S.C. § 1981(a), simply has never covered such claims. Nor did the 1991 amendments to the statute change this component of the legislative landscape. By establishing that the statute protected "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," 42 U.S.C. § 1981(b), the amendments in no way make one "term[] of the contractual relationship" the right to be free of a subordinate hostile work environment in a non-subordinate, non-employee, independent-contractor setting. On this basis alone, the sudden and expansive extension of the statute to this new setting, displacing all manner of State common law actions in the process, should have been rejected. The Court has long been "'reluctant to federalize'" matters historically covered by State law unless Congress clearly directs

it to do so. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977). *See also Mobil Oil v. Higginbotham*, 436 U.S. 618, 625 (1978) (noting that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules" and that "to prescribe a different measure of damages . . . or a different class of beneficiaries" would be inappropriate); *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *62 Cases of Jam v. United States*, 340 U.S. 593, 600 (1951) (refusing to extend statute "beyond the point where Congress indicated it would stop").

Yet, in the face of this textual silence, the court of appeals reasoned differently. Seizing on the fact that "nothing" in the statute "forbids such a claim," it jumped to the conclusion that this previously-unknown theory of liability is a permissible one and did so without considering any other canons of construction. (8a). This reasoning, of course, simply embraces an invariable attribute of silence—which always "forbids" "nothing"—and in the end offers no more explanation for expanding the reach of the statute than limiting it. At a minimum, the language of the 1991 amendments to § 1981 is ambiguous on the point, making it necessary to consider a host of other informative, and ultimately dispositive, legislative clues about the correct interpretation of the statute. The court of appeals' failure to do so by itself warrants review or a summary reversal.

2. As A Matter Of History And Context, The 1991 Amendments Do Not Cover Hostile-Work Environment Claims By Independent Contractors.

The 1991 amendments to § 1981 were not enacted in a vacuum. They arose as a specific response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), borrowed language from Title VII that had a well-understood application to hostile work environment claims brought just by employees,

and were enacted against the backdrop of a well-understood distinction between independent contractors and employees. As a matter of history, context and terminology, then, the amendments simply do not extend § 1981 to hostile-work claims brought by independent contractors.

In particular, three principles "of existing law," with which courts "assume that Congress [was] aware . . . when it pass[ed]" the 1991 amendments, limit the reach of § 1981. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (citation omitted). **First**, the 1991 amendments, all agree, were prompted by *Patterson v. McLean Credit Union*, 491 U.S. 164. In rejecting the argument that § 1981 reached hostile-work environment claims brought by employees, *Patterson* concluded that the terms "make and enforce" contracts covered only the formation of an employment contract, not racial harassment that occurred during the course of employment, a subject already covered by Title VII's prohibition against discrimination with respect to "terms, conditions, or privileges" of employment, 42 U.S.C. § 2000e-2(a)(1). *Patterson*, 491 U.S. at 178-80. Two years later, the national legislature responded to *Patterson* by simply borrowing the operative language from Title VII that proscribed a hostile work environment in employment, and made these provisions applicable to § 1981 claims. The 1991 amendment thus defined "make and enforce contracts" to include "the enjoyment of all benefits, privileges, terms, and conditions" of the contractual relationship. 42 U.S.C. § 1981(b).

Where, as here, "Congress borrows terms" from another body of law, the Court has repeatedly said that the legislature

> presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such

> case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952). *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144-45 (1990) (when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted similarly); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). The Court has said the same thing when it comes to the specific context of construing § 1981. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (noting that "whatever ambiguity there may be in the language of § 1981 is clarified by an examination of the legislative history of § 1981's language") (citation omitted). Congress identified a problem regarding the failure of § 1981 to reach hostile-work environment claims brought by employees, and incorporated language from Title VII that specifically addressed this employee-centered problem. The 1991 amendments thus "cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951). *See also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) ("courts should interpret [statute]'s meaning in light of . . . the particular evils at which the legislation was aimed").

Second, not only does the cause-and-effect relationship between *Patterson* and the 1991 amendments inform the reach of § 1981, so too does the very nature of a hostile work environment claim as it was understood at the time of the 1991 amendments and indeed as it has been understood ever since. Not until *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-67 (1986), did the Court first recognize that gender (or racial) harassment that had "the purpose or effect of unreasonably

interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" violated Title VII because it amounted to individual discrimination in "terms, conditions, or privileges of employment." *See Patterson*, 491 U.S. at 179-80. Anchored to Title VII and its coverage of civil rights claims by "employees," the theory of hostile work environment was necessarily linked to the subordinate employee-employer relationship. "For sexual harassment to be actionable," the Court indicated, "it must be sufficiently severe or pervasive to alter the conditions of [the victim's] *employment* and create an abusive *working* environment." *Meritor*, 477 U.S. at 67 (quotation omitted) (emphasis added). Indeed, one defense to a hostile-work complaint is the existence of "a procedure specifically designed to resolve" such claims, *id.* at 71, a defense that does not translate to non-employees of a company. *See Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998) (affirmative defense considers among other things whether "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer").

Since *Meritor*, the Court's hostile-work cases continue to be linked to the employee-employer relationship and continue to emphasize the individual nature of these claims. "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). As *Harris* reiterates, the theory is one of "workplace equality," *id.*, and is about whether the conduct "unreasonably interferes with an employee's work performance," *id.* at 23, and ultimately asks whether "members of one sex [or race] are exposed to disadvantageous terms or conditions of employment to which members of the other sex

[or race] are not exposed," *id.* at 25 (Ginsburg, J., concurring). To our knowledge, whether one looks to case law prior to the 1991 amendments or even to case law after it, no court (other than the one below) has ever extended the theory of a hostile work environment to an independent contractor.

Third, besides following immediately on the heels of *Patterson* and besides embracing a theory of liability that has historically been limited to employees, the 1991 amendments emerged in the context of a legal distinction that has a well-established pedigree. The "distinction between employees and independent contractors," the Court has said, "has deep roots in our legal tradition and often serves as a line of demarcation for differential treatment of individuals." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721-22 (1996) (citations omitted). *See also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (noting Court's historical understanding of term "employee" as describing the conventional master-servant relationship); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) ("Congress passed an amendment . . . [t]he obvious purpose of [which] was to have the . . . courts apply general agency principles in distinguishing between employees and independent contractors").

Nor has the distinction been lost on Congress itself. After the NLRB embraced a definition of the term "employee" that covered independent contractors, *see NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), Congress quickly responded with new legislation. "In the law," the House Committee said in clarifying the two relationships, "there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the

difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. . . . Congress intended then, and it intends now, that the [NLRB] give to words not far-fetched meanings but ordinary meanings." H.R. Rep. No. 80-245, at 18 (1947). Under these circumstances and in light of these time-honored understandings, it seems exceedingly doubtful that Congress would suddenly abandon this tradition by merging the employee-spawned doctrine of a hostile-work environment claim with the distinct legal concept of independent-contractor status. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-25 (1992) (when Congress gives no specific guidance as to the meaning of a term, courts presume that Congress intended to incorporate traditional principles of agency law). The lower-court's contrary determination should be reviewed and reversed.

3. The Extensive Legislative History To The 1991 Amendments Is Utterly Silent About Extending Hostile-Work Claims To Independent Contractors.

Not surprisingly, in light of this background, the legislative history to the 1991 amendments says nothing about extending hostile work environment claims to independent contractors. One congressional report after another refers just to changing the outcome of *Patterson* and to "restor[ing]" the prior understanding that hostile work environment claims were available to employees under § 1981. H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630. Not once does Congress signal a desire to extend hostile-work claims beyond the employer-employee relationship. *See, e.g., id.* ("In the context of *employment* discrimination, for example, this would include, but not be limited to, claims of harassment . . . . [The amendments] would restore protection under federal law against harassment and other forms of intentional discrimination in the terms and conditions of *employment* for

more than 11 million *employees* in firms that are not covered by Title VII.") (emphasis added); *id.* at 676 ("Reversal of *Patterson* simply expands the *scope* of Section 1981 to clearly include all aspects of the *employment* relationship, a particularly important goal because only Section 1981 prohibits racial discrimination by employers with less than 15 employees.") (last emphasis added); H.R. Rep. No. 102-40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 730 (noting that effects of *Patterson* extended from employment context to suits for "alleged racial discrimination in insurance, auto repair, and advertising contracts" but making no mention of independent contractors); *id.* at 761 ("The bill . . . reverses *Patterson* by amending section 1981 to cover all aspects of the *employment* relationship") (emphasis added); *id.* (amendments give "redress to victims of *on-the-job* racial harassment") (emphasis added). Notably, the Court has looked to the legislative history of § 1981 in limiting its reach before. *See Georgia v. Rachel*, 384 U.S. 780, 791 (1966) ("The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights").

It strains credulity to assume that the national legislature would make such a consequential change in the law—extending hostile-work claims to independent contractors—while saying nary a word that it was doing so, to say nothing of engaging in any deliberative debate over the subject. *See Chisom v. Romer*, 501 U.S. 380, 396 & n.23 (1991) ("we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the . . . legislative history"); *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14 (1991) ("[i]f this amendment had been intended [as] petitioner suggests, we would expect to find some expression of that intent in the legislative history."). Congress deserves more credit than to have made such a significant

change in the law without even a discernible hint that it considered the matter.

Nor in light of the constitutional source of this law—the Thirteenth Amendment, *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968)—does it seem possible to sustain this broad interpretation. The whole point of enforcement legislation under the Thirteenth Amendment, as under the Fourteenth Amendment, is to remedy prior constitutional violations and to prevent future ones. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2206 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 519-22 (1997) (discussing the "remedial" nature of Congress's enforcement power under § 5 of the Fourteenth Amendment). Yet there is no evidence today or in the past, and certainly none in the congressional record, that the paradoxical problem of independent contractors and subordinate hostile-work environments is the kind of national issue that would warrant enforcement legislation. As the Court has required before, this "constitutional problem[]" should be "avoid[ed]" in view of the "otherwise acceptable construction" of the statute available. *Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 628-29 (1993) (citation and quotation omitted); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (in the face of silence, "declin[ing] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive [constitutional] questions"). Just last Term, the Court granted a petition that would have addressed the scope of Congress's enforcement authority under the Thirteenth Amendment. *See United Brotherhood of Carpenters and Joiners of Am. v. Anderson*, 119 S. Ct. 1495 (1999) (granting petition for writ of certiorari and reformulating question to address scope of constitutional authority for § 1981), *cert. dismissed*, 119 S. Ct. 2418 (1999)

(dismissing writ pursuant to parties' agreement under S. Ct. R. 46.1).

4. This Extension Of § 1981 Is Awkward In Theory And Will Make Little If Any Sense In Application.

Lastly, this concept of liability makes little sense in theory and will make even less sense in practice, and for this reason as well it is "unlikely" that Congress meant to adopt it. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). *See also Clinton v. City of New York*, 118 S. Ct. 2091, 2098 (1998) (rejecting reading of statute "which would produce an absurd" result) (quotation and citation omitted); *Chapman v. United States*, 500 U.S. 453, 476 (1991) (same).

One of the principal defenses to a hostile work environment claim is the existence of "preventive or corrective opportunities provided by the employer" and the failure of the employee to "take advantage" of those company procedures. *Ellerth*, 118 S. Ct. at 2270. Yet how would this doctrine apply to independent contractors? Would companies be expected to extend their internal grievance procedures to employees of other, independent businesses, including even competitors? Would employees of one company be penalized for not invoking the other company's procedures? In the event this defense is not available to defend claims by independent contractors, how could it still be said that hostile-work claims do not involve strict corporate liability? *See Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118 (1999); *Ellerth*, 118 S. Ct. 2257; *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). And how at any rate would an independent business show that the "workplace" of another independent business—where it may provide services for just 2-3 hours a week—is "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

working environment"? *Harris*, 510 U.S. at 21 (quotations and citations omitted). There are many questions here. And the answers to all of them render implausible this new-found theory of § 1981 liability.

But all of this is prelude to what seems to be the most conspicuous oddity of expanding § 1981 to hostile-work claims by independent contractors: It remains to be seen who if anyone could properly benefit from this expansive interpretation. Neither corporations nor individuals, it appears, will benefit in any meaningful way from these claims.

Take the situation of corporations. Section 1981 by its terms applies only to "contracts," 42 U.S.C. § 1981(a), and the contracting entities in these cases are invariably corporations—as in fact was true with Danco here. Yet hostile work environments injure individuals, not companies. *See Harris*, 510 U.S. at 21 (the statute covers "an environment that a reasonable person would find hostile or abusive"). Independent contractors such as Danco simply are not the types of entities that may suffer a hostile work environment, eliminating any standing they could possibly have to bring such eminently-personal claims. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977) ("a corporation . . . has no racial identity and cannot be the direct target of the alleged racial discrimination"). *See also Harris*, 510 U.S. at 21-22 ("if the victim *does not subjectively perceive* the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no [hostile work environment]") (emphasis added).

Nor may individuals customarily bring such claims. In most instances, as here, the individual simply will not be a contracting party, which as the lower court itself recognized, deprives the person of any claim at all. But even in the rare instance where that is not the case—because the individual,

say, is a sole proprietorship and enters into a contract with the offending company—the independent status of the individual will generally preclude the kind of subordinate control that makes such claims cognizable. Indeed, the only time that will not be true is precisely when individual claimants need a § 1981 claim least. Independent contractors in name, it is well established, may be treated as employees in fact when the necessary qualities of control exist. *See Darden*, 503 U.S. at 323-24 (discussing common law factors to consider in treating individual as an employee, including among other factors "the hiring party's right to control" the other). But in that instance, Title VII would of course protect them. In the end, what a hostile work claim requires (subordinate status and control) is precisely what independent contractors lack, making the claims mutually exclusive in theory and in coverage. Accordingly, even perhaps the best reason for sustaining the decision below—the commendable desire to further "society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension," *Patterson*, 491 U.S. at 188—does not support the court of appeals' analysis. The decision warrants further review, if not summary reversal.

II. THE DECISION EXACERBATES A LOWER COURT CONFLICT OVER THE STANDING OF CORPORATIONS TO BRING § 1981 CLAIMS ON BEHALF OF THEIR EMPLOYEES.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court stated in *dicta* that "a corporation . . . has no racial identity and cannot be the direct target of the alleged racial discrimination." 429 U.S. at 263. Ever since, the lower courts have disagreed whether a corporation can suffer "some threatened or actual" injury, *Warth v. Seldin*, 422 U.S. 490, 499 (1975), as is necessary to meet the "irreducible minimum" of Article III, *Valley Forge Christian College v. Americans United for Separation of Church and*

State, 454 U.S. 464, 472 (1982), when its employees face conduct prohibited by § 1981.

On one side of the ledger is the decision below. In the First Circuit's view (10a), a "corporation ordinarily carries out its activities through its employees, and work-site racial discrimination against Danco's employees could amount to racial discrimination against Danco causing damage to the company." That view is supported by other lower-court decisions. In *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir. 1982), for example, the Second Circuit held that a corporation possesses a racial identity and has standing to bring an action for racial discrimination under §§ 1981 and 1983 where a functional nexus exists between the purpose or activity of the corporation and the identity of the members of that corporation. *Id.* at 705-06. Other decisions too recognize that a corporation can embody a racial identity, suffer a § 1981 injury, and thus have standing to pursue a § 1981 claim. *See, e.g., Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 13-14 (1st Cir. 1979); *Rosales v. AT&T Info. Sys., Inc.*, 702 F. Supp. 1489, 1494 (D. Colo. 1988); *T & S Serv. Assocs. v. Crenson*, 505 F. Supp. 938, 943 (D.R.I.), *vacated on other grounds*, 666 F.2d 722 (1st Cir. 1981); *Yesteryears, Inc. v. Waldorf Restaurant, Inc.*, 730 F. Supp. 1341, 1351-53 (D. Md. 1989); *see also Triad Assocs. Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 591 (7th Cir. 1989) (discounting Supreme Court's statement regarding a corporation and racial identity and remanding case for reconsideration of standing in light of post-*Arlington Heights* decisions); *Marshall v. Kleppe*, 637 F.2d 1217, 1219-20 (9th Cir. 1980) (minority-owned corporation had standing to bring Fifth Amendment claim); *Organization of Minority Vendors, Inc. v. Illinois Central Gulf R.R.*, 579 F. Supp. 574, 588-89 (N.D. Ill. 1983) (corporation identified as minority business

enterprise under federal regulations had standing for § 1982 action).

On the other side of the ledger are several decisions in line with *Arlington Heights*. They all hold that a corporation is independent of its employees and members' racial identities and thus has no standing to bring § 1981 claims. *See Clifton Terrace Assocs., Ltd. v. United Technologies Corp.*, 929 F.2d 714, 721 (D.C. Cir. 1991) (owner of federally subsidized low-income housing complex lacked standing to press § 1981 race discrimination claims on behalf of its minority residents as there was insufficient identity of interest between company and tenants and as the "direct victims," tenants were "best situated to assert the individual rights in question"); *Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. 310, 318-19 (S.D.N.Y. 1993) (hotel association did not have standing to assert discrimination claims under § 1981 as association had not been discriminated against on basis of race); *Gersman v. Group Health Ass'n*, 725 F. Supp. 573, 578 (D.D.C. 1989) (finding no § 1981 standing because "corporations are legal entities separate and distinct from the . . . racial identit[y] of the individuals that comprise the corporation"), *aff'd on other grounds*, 931 F.2d 1565 (D.C. Cir. 1991). This conflict, which has divided the lower courts ever since *Arlington Heights*, warrants resolution.

III. THE LOWER COURT'S INTERPRETATION OF § 1981 AND ITS SUBSIDIARY STANDING DECISION DESERVE REVIEW NOW RATHER THAN LATER.

The court of appeals' sudden expansion of § 1981 warrants immediate review. Indeed, it is precisely the absence of a single holding of this Court or of any other supporting this new doctrine that makes review both appropriate and necessary. Most business is conducted by contracts between independent

enterprises. And some 8.3 million workers, representing 6.7% of the total work force, identify themselves as independent contractors. Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B. C. L. Rev. 239, 243 (1997) (citing U.S. Dep't of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements*, Report 900, at 1 (1995)). It thus is no exaggeration to portend the risk of the development of "a judicial oak" in this area "which has grown from little more than a legislative acorn." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

Consider the situation of Wal-Mart itself. The company currently operates over 2900 stores and employs over 815,000 employees. Each year the company also hires thousands of independent contractors to clean its parking lots, floors, and windows, paint the outside of its stores, remodel the interior and exterior of its stores, and perform a range of maintenance duties on plumbing, air conditioning, heating, alarms, and cash registers. Every time a vending machine is filled, trash is hauled away, or an armored car picks up deposits, an independent contractor is involved. The company also hires legal counsel, accountants, court reporters, and couriers. Many of the tasks performed by these independent contractors occur after hours when Wal-Mart personnel are not even present, as was true here, and much of the interaction between Wal-Mart employees and its independent contractors occurs by phone or mail. It is difficult to imagine how a responsible company can be expected to apply this new doctrine in these diverse circumstances, keeping in mind that in this case itself liability was established for alleged discrimination that occurred after hours and by an off-duty employee in two of the three alleged incidents.

No less important is the related question whether corporations have standing to bring discrimination claims on behalf of their employees. As the ever-expanding conflict in the lower courts illustrates, this issue arises with considerable frequency and cries out for prompt resolution by the Court.

Each of the above explanations for granting the writ assumes (perhaps unfairly) that the First Circuit erred. But even for those inclined to believe that the court of appeals accurately interpreted § 1981 and a company's standing to bring such claims, that is no reason for waiting longer to review the issue. Quite the opposite is true. Initial agreement with the First Circuit presents perhaps the strongest case for reviewing the issue promptly. No other circuit has issued a holding extending § 1981 to hostile-work claims filed by independent contractors. And many lower courts have denied corporations standing to vindicate discrimination claims of their employees. Right or wrong, in other words, employers, employees, and independent contractors alike deserve immediate review of the lower-court's decision.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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September 1999

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DANCO, INC. and Benjamin Guiliani, Plaintiffs, Appellees/Cross-Appellants,
v.
WAL-MART STORES, INC., Defendant, Appellant/Cross-Appellee.

Nos. 98-2101, 98-2269.

Decided May 12, 1999,
As amended June 11, 1999.

Before TORRUELLA, Chief Judge, BOUDIN and STAHL, Circuit Judges.

BOUDIN, Circuit Judge.

In the district court, Danco, Inc., and its owner Benjamin Guiliani, brought suit against Wal-Mart, which is a major discount retailer. On a claim for racial discrimination under 42 U.S.C. § 1981, the jury awarded the plaintiffs $650,000, based on a hostile work environment theory; the judge reduced the award to $300,000. Wal-Mart appeals from this judgment; the plaintiffs cross-appeal from the district court's dismissal prior to the jury's verdict of plaintiffs' claim for punitive damages.

Benjamin Guiliani — a Mexican-American — started his company, Danco, in 1988 to engage in the business of maintaining parking lots (cleaning, striping, etc.). He incorporated the company in 1994. He continued to be the sole shareholder, but employed his son, Daniel, and a small number of other employees from time to time. His principal contracts during the time in question were with various Wal-Mart stores.

On September 15, 1994, Guiliani signed a contract, on behalf of Danco, agreeing to perform parking lot maintenance for the Wal-Mart store in Augusta, Maine. The agreement

called for Danco to clear litter from the lot three times each week, and to clear sand from the lot (using a vacuum-type sweeper) once a week. The sweeping provision was included in the contract because the Augusta Wal-Mart had a special site approval permit, from the Maine Department of Environmental Protection, requiring the lot to be swept of sand each week to prevent the sand from being washed into a nearby brook.

According to Guiliani's trial testimony, he felt unwelcome at Wal-Mart soon after he signed the contract to maintain its lot. Early in October 1994, there were two men in a truck in the parking lot when he arrived to start working. They asked him what he was doing in the lot, and if "Big Bob" knew he was there. When the men told Big Bob (later identified as Bob Amadei, the maintenance supervisor) that Guiliani was in the lot, Big Bob told Guiliani to leave, saying that he did not know of anyone who had been hired to work on the lot. At trial, Amadei denied that he had ever had words with Guiliani.

Also early in October 1994, the words "White Supremacy" were spray-painted on the Wal-Mart parking lot, near to the spot where Guiliani and his son usually unloaded their equipment. Guiliani testified that he saw Amadei walking toward the store shortly before Guiliani drove over to the spot where the words were painted. His son Daniel testified that he had seen Amadei at the spot with a can of spray paint, leaning over as if he were spraying the paint. Amadei denied that he had anything to do with the graffiti.

Guiliani offered to cover over the spray paint in the parking lot, but Curtis Scheffe, the manager of the Augusta store and the person to whom Guiliani reported, said that he would take care of it and would investigate to find out who had done it. Although Scheffe testified at trial that he thought he had had an employee cover the graffiti with paint shortly after the incident, all other testimony indicated that the words remained on the lot for over a month. Guiliani claimed that he told Scheffe that he believed Amadei was the culprit, but Scheffe took no action

against Amadei. Scheffe said he did investigate and concluded that no one was willing to say that they knew anything about the incident, although two of Wal-Mart's night shift workers testified that he had not spoken personally to them about it.

A second incident occurred on October 14, 1994. Guiliani testified that Hamlin, another night shift employee, said to him, "I don't like your kind." When Guiliani asked what he meant, Hamlin said "Puerto Ricans." Guiliani said that he was Mexican-American. Then, Guiliani said, Hamlin pushed him and threatened to rip his head off. Guiliani returned to his vehicle, where his younger son (Benjamin, Jr., age 8) was waiting, and called the police a short time later. Hamlin testified that he had made only a harmless jest not involving race, that Guiliani started the quarrel, and that there was no pushing.

The final incident took place in November 1994. Guiliani testified that Hamlin yelled a racial slur at him from a passing vehicle. His son Benjamin, Jr., also testified that he heard the slur. Guiliani said that he was shaken by the incident, and again called the police. Hamlin again denied the incident. Scheffe testified that he again investigated, but did not discipline Hamlin because he could prove neither Guiliani's nor Hamlin's story.

In January 1995, Scheffe left the Augusta Wal-Mart, and James Helterbrake replaced Scheffe as the manager. Guiliani testified that when he told Helterbrake in February about the earlier incidents, Helterbrake became angry about the police's having been called. Later in the month, Helterbrake gave Danco notice that the company's services were to be terminated, assertedly because Helterbrake was unhappy with Danco's work. After further discussions, a new contract was signed on February 21, 1995, calling for Danco to sweep twice a week. However, Helterbrake remained unhappy with the sweeping and terminated that contract at the end of March.

At trial, Charles Kellogg of the Maine Department of Environmental Protection testified that he had been displeased about the amount of sand left on the lot. He said that he spoke to Scheffe and Helterbrake a number of times about the sand on the lot, as both confirmed. In February 1995, Kellogg sent a letter to Wal-Mart stating that the sand removal had not been adequate. Kellogg also testified that he had spoken to Guiliani about the state of the lot, but Guiliani denied this. At the time Guiliani was terminated, Kellogg said that he was considering steps against Wal-Mart to enforce the permit condition.

In March 1997, approximately two years after the termination of Danco's contract, Guiliani and Danco sued Wal-Mart. The complaint alleged a violation of civil rights under 42 U.S.C. § 1981, denial of public accommodations in violation of 5 Maine 1 R.S.A. § 4551 *et seq.*, breach of written contract, breach of oral contract, unjust enrichment, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and requests for compensatory and punitive damages. Wal-Mart moved for summary judgment on all counts. The district judge then dismissed three of the state claims and set the others for trial.[1]

The case was tried to a jury in late April 1997. At the close of the plaintiffs' case, Wal-Mart moved for a directed verdict on all remaining claims, but the district court granted the motion only as to the request for punitive damages. As part of its motion, Wal-Mart argued unsuccessfully that the civil rights claim under section 1981 should be treated as comprising only a wrongful termination and not a hostile work environment theory. The court also refused to reconsider its pre-trial

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[1] The claims dismissed on summary judgment were public accommodations, negligence, and intentional infliction of emotional distress. The dismissal has not been appealed. The claims set for trial were the section 1981 claim, the contract claims, and the claim for negligent infliction of emotional distress.

decision not to allow Wal-Mart to impeach Guiliani's credibility based on an incident that occurred some 15 years before.

Before instructing the jury, the judge told counsel that he would tell the jury to treat the two plaintiffs as one person — Benjamin Guiliani — for the purpose of their deliberations. Neither side objected to this instruction which the judge then gave. The judge's instructions as to section 1981 included separate instructions on the discriminatory termination theory and the hostile work environment theory. For the hostile work environment theory, the judge gave instructions that would be standard for a Title VII hostile work environment claim, but omitted any references to "employee" (because of Danco's independent contractor status). Throughout, the court rejected Wal-Mart's argument that independent contractors had no right to make such claims based on a hostile work environment theory.

By special verdict, the jury found for the plaintiffs on the hostile work environment theory under section 1981, the claim for negligent infliction of emotional distress, and one of several contract theories.[2] The jury found for Wal-Mart on the discriminatory termination theory under section 1981 and on the remaining contract theories. The jury awarded the plaintiffs $650,000 on the hostile work environment claim and — despite the liability finding — zero damages on the claim for negligent infliction of emotional distress. The judge granted a remittitur to which the plaintiffs assented, reducing the jury's award of $650,000 to $300,000. *Cf. Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1396 (6th Cir. 1990), *cert. denied*, 498 U.S. 1082, 111 S. Ct. 952, 112 L. Ed.2d 1041 (1991).

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[2] The contract theory accepted by the jury involved a contract to clean a parking lot at a different Wal-Mart-owned store and resulted in an award of $4,400. No appeal has been taken as to this award.

Wal-Mart now appeals on two different grounds from the district court's refusal to award Wal-Mart judgment as a matter of law: first, that an independent contractor cannot bring suit based on a hostile work environment under section 1981, and second, that the evidence presented at trial was insufficient to show a hostile work environment. Wal-Mart also says that the district court erred in refusing to admit proffered evidence to impeach Guiliani's credibility. Plaintiffs cross-appeal challenging the district court's decision to withdraw their punitive damages request from the jury.

We review *de novo* the district court's denial of judgment as a matter of law, viewing the evidence in the light most favorable to the nonmovant. *See Correa v. Hospital San Francisco*, 69 F.3d 1184, 1191 (1st Cir. 1995), *cert. denied*, 517 U.S. 1136, 116 S. Ct. 1423, 134 L. Ed.2d 547 (1996). The most important issues raised by Wal-Mart's motion involve the construction of 42 U.S.C. § 1981, which *inter alia* gives all persons equal rights to "make and enforce contracts" free from racial discrimination. The initial question is whether this provision gives an independent contractor a racial discrimination claim based on the hostile work environment theory that would be available to an employee under an ordinary employment contract.

The Supreme Court first recognized the hostile work environment theory under Title VII, 42 U.S.C. § 2000e-2, which prohibits discrimination in employment on racial or gender grounds (among others). In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986), the Court found that sexual misconduct that had "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" violated Title VII because, in the words of the statute, it amounted to sex-based discrimination in "terms, conditions, or privileges of employment." Under Title VII, the same theory also applies to

racial harassment of employees that has the same effects. *Lattimore v. Polaroid Corp.*, 99 F.3d 456, 463 (1st Cir. 1996).

Title VII is unavailable to plaintiffs here because they were never Wal-Mart employees. For this reason, the complaint relied upon section 1981, which is part of the original Civil Rights Act of 1866. Unlike 42 U.S.C. § 1983, which broadly protects federal rights from impairment under color of state law, section 1981 protects only certain specified rights, including the right to make and enforce contracts, and it protects them only against racial discrimination. But since 1968, section 1981 has been applied to private acts of discrimination as well as official acts.[3]

In addition, the Supreme Court held in 1975 that the statute covers employment contracts, thereby protecting against racial discrimination in the employment relationship. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60, 95 S. Ct. 1716, 44 L. Ed.2d 295 (1975).

However, until 1991, section 1981 was read literally as applying only to the making and enforcement of contracts, and "enforcement" was read narrowly to include only enforcement by legal process. *Patterson v. McLean Credit Union*, 491 U.S. 164, 177-78, 109 S. Ct. 2363, 105 L. Ed.2d 132 (1989). *Patterson* held that no hostile work environment claim could be brought under section 1981 because the environment might discriminate in the carrying out of a contract — infringing its

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[3] The Supreme Court ruled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 88 S. Ct. 2186, 20 L. Ed.2d 1189 (1968), that 42 U.S.C. § 1982, a directly analogous statute, prohibited acts of private discrimination, and the courts have applied this ruling to section 1981. *See, e.g., Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 481 (7th Cir.), *cert. denied*, 400 U.S. 911, 91 S. Ct. 137, 27 L. Ed.2d 151 (1970); *Scott v. Young*, 421 F.2d 143, 145 (4th Cir.), *cert. denied*, 398 U.S. 929, 90 S. Ct. 1820, 26 L. Ed.2d 91 (1970). The constitutional basis is the Thirteenth Amendment. *See Jones*, 392 U.S. at 413, 88 S. Ct. 2186.

terms, conditions and privileges — but did not impede the "making" or "enforcement" of contracts. 491 U.S. at 178, 109 S. Ct. 2363.

In 1991, Congress amended section 1981 specifically to overrule the *Patterson* decision. *See* H.R.Rep. No. 102-40(I), at 141 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 670. New language defines the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). This language tracks language of Title VII prohibiting discrimination with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Thus, hostile work environment claims may now be pursued by employees under both Title VII and section 1981. *See Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1008 n. 17 (11th Cir. 1997) (collecting cases).

If an employee may sue under section 1981 on a hostile work environment theory, can an independent contractor also do so? On the face of the statute, nothing forbids such a claim. Section 1981 does not limit itself, or even refer, to employment contracts but embraces all contracts and therefore includes contracts by which a corporate independent contractor like Danco provides service to another corporation like Wal-Mart. *See T & S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 725 (1st Cir. 1981). One could say that avoiding a hostile work environment is an implicit contractual benefit or term that exists for employees but not independent contractors, yet nothing in the statute's language supports such a limitation.

Wal-Mart makes two arguments against allowing a hostile work environment claim by an independent contractor. The first is that the 1991 amendment was intended to secure such claims for *employees*, as the legislative history makes clear. *See* H.R.Rep. No. 102-40(I), at 141, *reprinted* in 1991

U.S.C.C.A.N. 549, 670. But references to employees appear because most cases involve employees rather than independent contractors. There is nothing in the legislative history to suggest that Congress had any objection to providing similar benefits to independent contractors, and the *language* it used in its amendment applies as readily to the one as to the other. In fact, H.R.Rep. No. 102-40(I), at 92, *reprinted* in 1991 U.S.C.C.A.N. 549, 630, states that "[t]he Committee intends this provision to bar all race discrimination in contractual relations."

Alternatively, Wal-Mart paints a vivid picture of liability run amok if a company is made responsible not only to protect its own employees against racial harassment in the workplace but also to protect all of the contractors with whom the company may deal. These problems may be considerable, but it is fair to point out that the hostile work environment theory is likely to be useful only to those independent contractors who work on site, and (as we shall see) the claims of such contractors are more limited than Wal-Mart supposes. Beyond that, the problems if any are for Congress to fix.

Nevertheless, in the present case Danco has a potential claim under section 1981, but Guiliani does not. The same statutory language that gives a claim to Danco, as an independent contractor with Wal-Mart, precludes such a claim by Guiliani unless he also had a contract with Wal-Mart. It appears, not surprisingly, that the contract in question was between Wal-Mart and Danco.[4] Nothing in section 1981 provides a personal claim, so far as its language is concerned, to one who is merely *affiliated* — as an owner or employee — with a contracting

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[4] Although the complaint said that the Wal-Mart contract was with "plaintiffs," Wal-Mart's statement of undisputed facts corrected this assertion, citing to the contract itself, and plaintiffs' counter-statement did not disagree. An examination of the contract itself makes clear that the two parties to the contract were Wal-Mart and Danco.

party that is discriminated against by the company that made the contract.

A corporation ordinarily carries out its activities through its employees, and work-site racial discrimination against Danco's employees could amount to racial discrimination against Danco causing damage to the company. But the employee cannot collect damages on his own behalf. *Cf. Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1573 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068, 112 S. Ct. 960, 117 L. Ed.2d 127, *but original opinion adopted on remand*, 975 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068, 114 S.Ct. 1642, 128 L. Ed.2d 363 (1994); *Perez v. Abbott Lab.*, 1995 WL 86716, at *6 (N.D. Ill. Feb. 27, 1995). And the suffering of Guiliani, however real, is not automatically damage to Danco.

Thus, if the issue had been raised, Wal-Mart would likely have been entitled to an instruction that Guiliani had no claim of any kind under section 1981 because he had no contract. Further, Guiliani offered evidence that he had suffered emotional harm but there does not appear to be evidence that Danco, as distinct from Guiliani, was measurably damaged by the racial incidents. So Wal-Mart might also have been entitled to a directed verdict on Danco's hostile work environment theory for lack of evidence of damages to Danco. However, so far as we can tell, neither point was argued to the district court.

It is true that Wal-Mart argued in the district court that neither Danco nor Guiliani had a claim under section 1981. But the reasons given were quite different. It is well settled that to preserve a claim for review on appeal, the party claiming error must have supplied the right ground for the request. The basis for this requirement is obvious: the judge must largely rely upon the parties to research and raise issues, and giving the judge the wrong reason for a request is usually equivalent to giving the judge no reason at all. *Havinga v. Crowley Towing & Transp. Co.*, 24 F.3d 1480, 1483 n.5 (1st

Cir. 1994); *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 810 (1st Cir.), *cert. denied*, 488 U.S. 955, 109 S. Ct. 392, 102 L. Ed.2d 381 (1988).

This brings us to the plain error doctrine. *Hammond v. T.J. Litle & Co., Inc.*, 82 F.3d 1166, 1172 (1st Cir. 1996). The requirements for plain error, set forth by the Supreme Court in *United States v. Olano*, 507 U.S. 725, 732-35, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993), are that there be error, that it be plain, that it affect substantial rights and that the error threaten "miscarriage of justice." *Olano* was a criminal case but in this circuit, the same requirements are commonly imposed in civil cases, and even more stringently. As we said recently in *Beatty v. Michael Bus. Machs. Corp.*, 172 F.3d 117, 121 (1st Cir. 1999) (citations and internal quotation marks omitted):

> The plain error exception should be applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice. The exception should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.

In this case, letting any claim by Guiliani under section 1981 go to the jury was an error; it was arguably at least "plain" error; and it affected substantial rights in the sense that no damages to Danco were proved from the harassment. But there are several reasons which, taken in combination, persuade us that there is no miscarriage of justice or any other reason sufficient to exercise our discretion to notice the error or errors in the case before us. *Olano*, 507 U.S. at 736, 113 S. Ct. 1770; *Beatty*, 172 F.3d 117, 121.

The first reason is that Wal-Mart, as well as the plaintiffs, affirmatively consented to the district court's instructions to treat Guiliani and Danco interchangeably. The reasons may have been tactical or may have resulted from a genuine

misunderstanding of the law that governs whether and when a small incorporated business can be treated interchangeably with its owner and operator.[5] If the former, this would be a waiver not subject to plain error; but even if the latter is true, it is at least a consideration, in exercising our discretion, that the legal issue was specifically discussed and counsel affirmatively consented to treating the plaintiffs as one.

Second, it counts heavily against finding plain error that the party on the other side would be unfairly prejudiced. Here, it seems unlikely that Danco itself could have established monetary damages of any size from the racial incidents; but it is not impossible that some showing could have been attempted *if* the plaintiffs had known that Guiliani's right to recover for the emotional effects on him was legally disputed on the basis we are now considering. Whether and how much damage Danco might have been proved is speculative; but that is exactly why we cannot say for sure that there was no prejudice from the failure to raise the objection in timely fashion.

Third, the jury would likely have awarded substantial damages, and quite possibly the same $650,000, on the negligent infliction claim if Guiliani's section 1981 claim had been stricken. As the case was tried, the same racial harassment underlay both claims. Whatever the jury was told in the instructions, the jury's decision to award zero damages for negligent infliction, after a finding that Wal-Mart was liable on that claim, was probably due to the jury's belief that the award on the section 1981 claim already covered the same

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[5] There is little indication from the facts in this record that Guiliani would be subject to suit under a "piercing the veil" theory if Danco committed a tort, *Theberge v. Darbro, Inc.*, 684 A.2d 1298, 1300- 01 (Me. 1996); Henn & Alexander, *Laws of Corporations* § 147, at 352-53 (3d ed.1983); but there is even less basis in law for assuming that, if the corporation were a sham, Guiliani could take advantage of a sham he had created to assert Danco's rights *as a plaintiff, see LaBelle v. Crepeau*, 593 A.2d 653, 655 (Me. 1991).

injury. In sum, we do not find that this error "calls into question the fairness, integrity, or public reputation of judicial proceedings." *Beatty*, 172 F.3d 117, 121.

It remains to consider, on Wal-Mart's appeal, its claim that it was entitled to judgment as a matter of law under section 1981 because the evidence was not sufficient for a reasonable jury to find that a hostile work environment existed. The barrier to reversal on this ground is high, given the jury's superior ability to gauge the witnesses and draw inferences in favor of one side or the other on this highly factual issue. *See Costos v. Coconut Island Corp.*, 137 F.3d 46, 48 (1st Cir. 1998). Viewing the evidence in the light most favorable to the plaintiffs, this may have been a thin case but not so thin as to preclude a reasonable jury from finding a hostile work environment.

To make out a hostile work environment claim, the plaintiff must show not only a contractual relationship but also two further elements: (1) that the plaintiff was exposed to comments, jokes, or acts of a racial nature by the defendant's employees; and (2) that the conduct had the purpose or effect of interfering with the plaintiff's work performance or created an intimidating, hostile or offensive working environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20-22, 114 S. Ct. 367, 126 L. Ed.2d 295 (1993). In addition, the defendant will ordinarily only be liable for harassment by low-level employees if management-level employees knew or should have known about it. *See Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 1999 WL 160796 at *3 (9th Cir. Mar.25, 1999).

In this case, the plaintiffs alleged three race-related incidents. While a plaintiff must show "more than a few isolated incidents of racial enmity," *Snell v. Suffolk County*, 782 F.2d 1094, 1103 (2d Cir. 1986), there is no "absolute numerical standard" by which to determine whether harassment has created a hostile environment, *Vance v. Southern Bell Telephone & Telegraph*

Co., 863 F.2d 1503, 1511 (11th Cir. 1989). In the Supreme Court's words:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Harris, 510 U.S. at 23, 114 S. Ct. 367.

In this case, all of the incidents involved utterances but one also involved a low level of physical violence (or so the jury could have found) and one, it could be argued, effectively lasted for months because Guiliani had to face the graffiti on the parking lot every time he worked on the lot. Guiliani also alleged that he altered his schedule so that he would work on the Wal-Mart lot in daylight because of the harassment, an action that suggests some amount of interference with his work because of the harassment. Although much of the evidence was contested, the jury is assumed to have believed the plaintiffs' version. *See Correa*, 69 F.3d at 1191.

Even on this premise, these allegations do seem rather tame compared to many reported cases involving racially hostile working environments. *Cf. West v. Philadelphia Elec. Co.*, 45 F.3d 744, 749-52 (3d Cir. 1995); *Snell*, 782 F.2d at 1098-1100 (2d Cir. 1986). However, they are not so trivial that we would countermand a jury's decision that they constituted a violation of section 1981. Of course, no evidence exists that Danco itself suffered specific monetary damage; but (as already noted), that may be because Wal-Mart's legal attack on the section 1981 claim was insufficiently precise to alert plaintiffs to any need to make such a separate showing.

Wal-Mart's final ground for appeal is that the district judge should have allowed Guiliani to be impeached based on a 15-year old incident. While Guiliani's credibility was certainly

important, the probative value of the incident was minimal, and a danger of prejudice existed. Exclusion of the evidence was not an abuse of the district court's substantial discretion to allow or exclude such impeaching evidence. *See Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1340 (1st Cir. 1988).

Turning to the plaintiffs' cross-appeal, their claim is that the district court erred in deciding that the evidence did not permit an award of punitive damages and in withdrawing that issue from the jury. The standard for punitive damages in civil rights cases, whether under Title VII or sections 1981-83, is drawn from *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed.2d 632 (1983), where the Court said that the plaintiff must show that the defendant acted with "evil motive or intent" or with "reckless or callous indifference" to the plaintiff's federally protected rights.[6]

However, section 1983 cases like *Smith v. Wade* itself, often involve only the wrongdoing individual, whereas cases like this one and cases under Title VII often involve a company from whom the plaintiff seeks compensation and punitive damages for the acts of low-level employees. Company liability for compensatory damages is fairly easy to establish although not automatic, *e.g.*, *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2292-93, 141 L. Ed.2d 662 (1998); but the rule for punitive damages has been complicated because the precedents often do not distinguish between the wrongdoing employee and the employer against whom the punitive damage claim is directed.

Such distinctions may not be pertinent where the discriminatory conduct is a matter of company policy or is

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[6] *Smith* was a section 1983 case, but the same standard has been applied by this court and others under section 1981, *e.g.*, *Rowlett v. Anheuser-Busch*, 832 F.2d 194, 205 (1st Cir. 1987), and Congress in 1991 wrote similar language into Title VII to govern punitive damages. 42 U.S.C. § 1981a(b)(1).

engaged in by management officials whose own intent may automatically be imputed to the company. *Cf. Dichner v. Liberty Travel*, 141 F.3d 24, 28-29 (1st Cir. 1998); *Rowlett*, 832 F.2d at 201-03. However, where, as here, we are concerned only with isolated acts of harassment by ordinary employees — Amadei had limited supervisory authority but not over Guiliani — it follows that punitive damages should be afforded only where the management itself "by evil motive or intent" engaged in racial discrimination or behaved in a manner that showed "reckless or callous indifference" to such discrimination. *Smith*, 461 U.S. at 56, 103 S. Ct. 1625.

This view has been taken in well-reasoned decisions in the Fourth and Tenth Circuits.[7] More important, it accords with the Supreme Court's reminder in *Smith* that punitive damages are to deter seriously wrongful conduct by the defendant and not just to provide another layer of compensation. *See Hernandez-Tirado v. Artau*, 874 F.2d 866, 869 (1st Cir. 1989) (Breyer, J.). It is consistent with this view to require that before a company is held liable for *punitive* damages for acts of harassment by low-level employees, there be some culpability beyond mere negligence at the management level.

In this instance, the district judge rightly concluded that no such malicious or evil intent or reckless indifference could be attributed to Wal-Mart, whatever one might say about Amadei and Hamlin. Even if Scheffe could be described as management for this purpose–which we will assume *arguendo* but do not decide–there is no indication that he was motivated by racist attitudes or that he paid no attention to the complaints

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[7] *See Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982-84 (4th Cir. 1997); *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1262-64 (10th Cir. 1995). The Fifth Circuit originally adopted a more plaintiff-friendly standard in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998). However, the opinion has been vacated and the case set for rehearing. 169 F.3d 215 (5th Cir. 1999).

of harassment by Guiliani. On the contrary, the record shows that he investigated two of the three incidents but found no definitive evidence as to what had happened; and on the remaining incident Scheffe testified that he had undertaken an investigation and explained why it bore no fruit, and there was no conclusive proof to the contrary.

Certainly a jury might have found that Scheffe was careless. He apparently did not question all of the 14 night shift workers about the spray paint episode, and he failed to see that the spray paint was promptly removed, even though he testified that he thought he had given instructions that it be done and that this had occurred. But Guiliani himself testified that Scheffe was not racist, and Scheffe's missteps hardly reveal the evil intent or reckless disregard of civil rights necessary to support punitive damages.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANCO, INC. and	)	
Benjamin Guiliani,	)	
Plaintiffs	)	
	)	**Civ. No. 97-0054-B**
v.	)	
	)	
WAL-MART STORES, INC.,	)	
Defendant	)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiffs, Danco, Inc. ("Danco") and Benjamin Guiliani bring this action against Defendant, Wal-Mart Stores, Inc. ("Wal-Mart"), alleging violations of Plaintiffs' civil rights under 42 U.S.C. § 1981 (Count I), denial of Plaintiffs' full and equal enjoyment of the public facilities of Defendant (Count II), breach of written and oral contracts (Counts III and IV), unjust enrichment (Count V), negligence (Count VI), intentional and negligent infliction of emotional distress (Counts VII and VIII), and willful and wanton conduct in support of a punitive damages claim (Count IX). Before the Court is Defendant's Motion for Summary Judgment on all counts of Plaintiffs' Complaint. For the reasons set forth below, Defendant's Motion is GRANTED in part and DENIED in part.

BACKGROUND

For the purposes of summary judgment, the Court views the facts in the light most favorable to the nonmoving party. *See McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995). Plaintiff Benjamin Guiliani, a Mexican-American of Mexican-Hispanic descent, is the owner and sole shareholder

of Plaintiff Danco, a commercial industrial maintenance company incorporated in 1994.

On or about September 15, 1994, Danco entered into a written contract with the Augusta Wal-Mart store whereby Danco was to provide parking lot cleaning and maintenance services. In a letter dated January 30, 1995, Defendant terminated this contract effective March 2, 1995. Subsequently, however, after discussing the matter, the parties signed a new contract for parking lot maintenance services dated February 21, 1995. Around the same time that Danco entered into its initial contract with the Augusta Wal-Mart, in the fall of 1994, Danco also entered into oral agreements with other Wal-Mart stores in Scarborough, Windham, Auburn, Farmington, Rockland, Waterville, and the Sam's Club in Augusta[1] to provide parking lot cleaning and maintenance services. On March 15, 1995, Danco entered into a written contract for parking lot services with the Augusta Sam's Club.

In October 1994, Mr. Guiliani and his son Daniel observed the words "White Supremacy" spray-painted on the parking lot pavement of the Augusta Wal-Mart. Daniel claims to have observed the Augusta Wal-Mart maintenance manager, Robert Amadei, spray-painting the words on the pavement earlier in the day. Mr. Guiliani immediately reported the incident to the Augusta Wal-Mart store manager, Curtis Scheffe, and informed Mr. Scheffe that he found the words to be highly offensive. Mr. Guiliani offered to remove the words from the parking lot immediately, but Mr. Scheffe assured Plaintiff that he would take care of it. Mr. Scheffe conducted an investigation into who may have spray-painted the words, but the words allegedly remained on the pavement for over two months.

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[1] Defendant Wal-Mart is registered and licensed to do business in the State of Maine under the names Wal-Mart and Sam's Club.

On or about October 14, 1994, a few days after the spray-painting incident, a Wal-Mart employee, Scott Hamlin, racially harassed and physically assaulted Mr. Guiliani on the premises of the Augusta Wal-Mart store. Plaintiff Guiliani immediately called the police and reported the incident to Mr. Scheffe. Mr. Scheffe, however, failed to take any disciplinary action against Mr. Hamlin. On or about November 12, 1994, Mr. Hamlin allegedly further subjected Mr. Guiliani to racial harassment, by shouting out a racial slur as he was driving out of the Augusta Wal-Mart and Mr. Guiliani and his son Benjamin were driving in. Mr. Guiliani reported this second incident to Mr. Scheffe. Again, Wal-Mart took no disciplinary action.

In January 1995, James Helterbrake replaced Curtis Scheffe as the Augusta Wal-Mart manager. Mr. Guiliani informed Mr. Helterbrake of the "White Supremacy" incident and the confrontations with Mr. Hamlin, and mentioned that he had contacted the police in response to two of the incidents. Upon learning of Mr. Guiliani's contact with the police, Mr. Helterbrake allegedly became angry and asked Mr. Guiliani why he had called the police and why the words "White Supremacy" bothered him. Following this conversation, Mr. Helterbrake treated Mr. Guiliani in a hostile manner.

In late March 1995, while Mr. Guiliani and Daniel were completing their cleaning of the Augusta Wal-Mart parking lot, Mr. Guiliani observed a sanding contractor enter the parking lot and begin to sand the ice. Mr. Guiliani also noticed Mr. Helterbrake watching the sanding contractor from in front of the store. The following day Mr. Helterbrake terminated Danco's contract, on the ground that Danco was unsatisfactorily performing its cleaning duties. Mr. Helterbrake told Mr Guiliani that Charles Kellogg from the Maine Department of Environmental Protection ("DEP") had complained the previous night about the sand on the lot and had threatened Wal-Mart with a $500,000 fine. Mr. Kellogg

has testified that he never threatened the Augusta Wal-Mart with a $500,000 fine. Mr. Helterbrake also told Mr. Guiliani that he did not wish to see him around the Augusta Wal-Mart store again. Soon after Mr. Helterbrake terminated Danco's contract with the Augusta Wal-Mart, other Wal-Mart stores began terminating their contracts with Danco without proper notice or cause.

SUMMARY JUDGMENT

Summary judgment is appropriate in the absence of a genuine issue of any material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine for summary judgment purposes, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is one that has "the potential to affect the outcome of the suit under applicable law." *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993). Facts may be drawn from "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Fed. R. Civ. P. 56(c).

DISCUSSION

A. Count I — Section 1981

In Count I, Plaintiffs allege that Defendant violated Plaintiffs' civil rights pursuant to 42 U.S.C. § 1981. Specifically, Plaintiffs allege that Defendant failed to prevent or remedy a racially hostile work environment, and ultimately terminated Danco's written contract with the Augusta Wal-Mart for racially discriminatory reasons. The Court is persuaded that summary judgment on Count I of Plaintiffs' Complaint is inappropriate at this stage of the proceedings.

Section 1981(a) provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . ." 42 U.S.C. § 1981(a).

Section 1981(b) defines the term "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981(b). The First Circuit has held that analysis of a section 1981 claim is "substantially identical" to analysis of a Title VII claim. *See Villanueva v. Wellesley College*, 930 F.2d 124, 127 n.2 (1st Cir. 1991). In both types of claims, "the ultimate issue is whether the defendant intentionally discriminated against the plaintiff. . . ." *Ayala-Gerena v. Bristol Meyers-Squibb Co.*, 95 F.3d 86, 95 (1st Cir. 1996).

The Court first addresses Plaintiffs' contention that Defendant subjected Plaintiff Guiliani to a hostile working environment. To prevail on a hostile work environment claim, Plaintiffs must establish: (1) unwelcome comments, jokes, acts, and other verbal or physical conduct of a racial nature in the workplace; (2) that such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment; and (3) that the employer, or its agents or supervisory employees, knew or should have known of the conduct. *Duplessis v. Training & Dev. Corp.*, 835 F. Supp. 671, 677 (D. Me. 1993) (setting forth standard for hostile work environment claim under Title VII). Once Plaintiffs have established these factors, Defendant "may rebut a prima facie case by showing it took immediate and appropriate corrective action." *Id.*; *see also DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1st Cir. 1980) ("employer who has taken reasonable steps under the circumstances to correct and/or prevent racial harassment by its nonsupervisory personnel has not violated Title VII").

In determining whether harassment is sufficiently severe as to constitute a hostile working environment, courts "look to the gravity as well as the frequency of the offensive conduct."

DeNovellis v. Shalala, 124 F.3d 298, 311 (1st Cir. 1997) (analyzing Title VII hostile work environment claim). A court's decision must be based on the totality of the circumstances. *Duplessis*, 835 F. Supp. at 677.

The Court is satisfied that Plaintiffs have raised genuine issues of fact with respect to each of the elements of their claim alleging a hostile work environment. The spray-painted words "White Supremacy," as well as both of Mr. Hamlin's alleged confrontations with Mr. Guiliani constitute unwelcome comments and/or actions of a racial nature in the workplace. Although Mr. Hamlin may have been off-duty when he confronted Mr. Guiliani, the altercations took place on Wal-Mart's premises, indeed in the very place where Mr. Guiliani performed his duties. Plaintiffs allege that the harassment caused Mr. Guiliani great mental anguish and directly interfered with his work performance, by causing him to perform his duties during the day rather than at night because he feared for the safety of himself and his family. While the incidents of harassment may not have been large in number, the Court is persuaded that their potential severity is sufficient to preclude summary judgment.

Plaintiffs have also presented evidence sufficient to create a question of material fact on the issue of Defendant's knowledge of the discriminatory conduct. Mr. Guiliani allegedly reported each of the three discriminatory incidents to the Augusta Wal-Mart manager, Mr. Scheffe. Although Mr. Scheffe conducted an investigation into the "White Supremacy" incident and told Mr. Guiliani he would handle removal of the words from the parking lot, Plaintiffs allege that the words remained on the pavement for over two months. Defendant further failed to take any disciplinary action against Mr. Hamlin although Mr. Scheffe was aware that the confrontations occurred. A reasonable jury could find that Defendant failed to take reasonable steps to prevent or correct a hostile work

environment, even though Defendant had knowledge of this offensive atmosphere.

Next, the Court turns to Plaintiffs' argument that Defendant unlawfully terminated Danco's contract with the Augusta Wal-Mart for racially discriminatory reasons. Contrary to Plaintiffs' contentions, the Court finds that Plaintiffs have not presented direct evidence of discrimination. The First Circuit has held that "[d]irect evidence is evidence which, in and of itself, shows a discriminatory animus." *Ayala-Gerena*, 95 F.3d at 96 (quoting *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990)). "[A]t a minimum, direct evidence does not include stray remarks in the workplace, particularly those made by nondecision-makers or statements made by decisionmakers unrelated to the decisional process itself." *Id.* Even assuming, as Plaintiffs allege, that the spray-painting was done by Mr. Amadei and that Mr. Amadei reported to the store manager about Danco's performance, Plaintiffs have not demonstrated that the spray-painting incident was sufficiently related to Mr. Helterbrake's decision to terminate Danco's contract so as to constitute direct evidence of discrimination.

In the absence of direct evidence of race discrimination, courts will apply the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Plaintiffs bear the initial burden of establishing a prima facie case of discrimination by proving that: (1) Plaintiffs were members of a protected class, (2) Plaintiffs performed their jobs satisfactorily; (3) Plaintiffs' contract was terminated; and (4) Plaintiffs' position remained open and was eventually filled by persons with Plaintiffs' qualifications. *Ayala-Gerena*, 95 F.3d at 95. This initial burden is not onerous. *See Lipsett v. University of Puerto Rico*, 864 F.2d 881, 899 (1st Cir. 1988). Once Plaintiffs have established a prima facie case of discrimination "the burden of production shifts to the defendant in order to show a legitimate nondiscriminatory reason" for its action. *Ayala-Gerena*, 95 F.3d at 96. If Defendant proffers

such a reason, the burden shifts back to Plaintiffs to establish that Defendant's reason is merely a pretext for intentional discrimination. *Id.*

Defendant contends that Plaintiffs have failed to satisfy the second prong of their prima facie case of discrimination, the requirement that Danco perform its job satisfactorily. Defendant alleges that Mr. Kellogg, a representative from the Maine DEP, criticized Plaintiffs and Wal-Mart for not performing parking lot maintenance as required by DEP regulations, and that Mr. Helterbrake was dissatisfied with Danco's performance. Plaintiffs respond that Wal-Mart District Manager, J.R. Lee, commented several times on the excellent work Danco was performing at the various Wal-Mart stores and that Mr. Kellogg never recommended that Mr. Helterbrake terminate Danco's services. The Court is satisfied that Plaintiffs have presented sufficient facts to support their prima facie claim of discrimination.

Turning to the second stage of the *McDonnell Douglas* analysis, the Court finds that Defendant has proffered a legitimate nondiscriminatory justification for the termination of Danco's contract, Danco's poor performance of its duties. The Court is persuaded, however, under the third and final stage of the *McDonnell Douglas* analysis, that Plaintiffs have put forth sufficient facts from which a reasonable factfinder could conclude that Defendant's justification was merely a pretext for discrimination. Even though the termination of Danco's contract with the Augusta Wal-Mart occurred when Mr. Helterbrake was in charge of the store, rather than Mr. Scheffe, the manager at the time the incidents of harassment occurred, Mr. Guiliani told Mr. Helterbrake of the alleged harassment. Indeed, in response to Mr. Guiliani's disclosure Mr. Helterbrake allegedly became angry, and thereafter treated Mr. Guiliani with hostility. Mr. Guiliani further contends that when Mr. Helterbrake terminated Danco's contract, he told Mr. Guiliani that Mr. Kellogg had threatened Wal-Mart with a

$500,000 fine. Mr. Kellogg has testified that no such fine was ever threatened. The Court is satisfied that genuine issues of material fact exist with respect to the reason behind the Augusta Wal-Mart's termination of Danco's contract. Accordingly, the Court denies Defendant's Motion for Summary Judgment on Count I.

B. Count II — Public Accomodations Discrimination

Plaintiffs allege in Count II that Defendant discriminated against and denied Mr. Guiliani the full and equal enjoyment of the public facilities of Defendant in violation of the "unlawful public accomodations" provision of the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.* Section 4592 of the Maine Human Rights Act provides:

> It is unlawful public accomodations discrimination, in violation of this Act:
>
> 1. Denial of public accommodations. For any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, sex, physical or mental disability, religion, ancestry or national origin, any of the accomodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms, or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

5 M.R.S.A. § 4592.

Plaintiffs allege that when Mr. Helterbrake terminated Danco's contract with the Augusta Wal-Mart and Mr. Guiliani questioned him about it, Mr. Helterbrake angrily told Mr.

Guiliani that he did not want to see him around the Augusta Wal-Mart again. Mr. Guiliani contends that he interpreted Mr. Helterbrake's statement to mean that Mr. Helterbrake did not wish Mr. Guiliani to go back to the property for any reason. Plaintiffs have not, however, presented any evidence that Mr. Guiliani was denied access to Defendant's premises, or denied access to shopping at the Augusta Wal-Mart. The Court is persuaded that Mr. Helterbrake's statement alone does not present a sufficient issue of material fact as to whether Mr. Guiliani was denied the full and equal enjoyment of Defendant's facilities to survive summary judgment. The Court, therefore, grants Defendant's Motion for Summary Judgment on Count II.

C. Count III — Breach of Written Contract

In Count III, Plaintiffs contend that Defendant breached written contracts with Plaintiffs by failing to pay Plaintiffs for their services provided pursuant to these contracts. Specifically, Plaintiffs allege that Defendant breached two written contracts, the February 21, 1995, contract between Danco and the Augusta Wal-Mart, and the March 15, 1995, contract between Danco and the Augusta Sam's Club.

With respect to the contract between Danco and the Augusta Wal-Mart, Plaintiffs allege by way of background that pursuant to ¶ 3 of the September 15, 1994, contract between the Augusta Wal-Mart and Danco, Danco dumped all "sweeping debris" into Wal-Mart's compactor. In February 1995, however, Mr. Amadei informed Mr. Guiliani that he could no longer dump debris into the compactor because of the weight of the sand. Mr. Guiliani contacted the person who had prepared the contract between Danco and Defendant, Helen Poulin of S.R. Weiner Associates, for guidance. After checking with Mr. Helterbrake, Ms. Poulin told Mr. Guiliani that he would have to haul the sand off site. In response to Mr. Guiliani's query as to what he should charge for such removal, Ms. Poulin told him that the going rate was $58.00 per ton.

As a result of this series of events, Plaintiffs contend that when Danco and the Augusta Wal-Mart entered into a new contract for parking lot maintenance on February 21, 1995, the provision allowing for the dumping of debris into Wal-Mart's compactor was absent. Plaintiffs allege that the parties mutually assented to Danco's hauling away of the debris and the subsequent reimbursement of Danco by Defendant. At a minimum, Plaintiffs argue, the ultimate disposition of the debris is an ambiguity in the contract. Defendant responds that since the contract does not expressly provide for the removal of sand off-site, Defendant's refusal to pay for such services does not constitute breach of contract.

Under Maine law:

> the paramount principle in the construction of contracts is to give effect to the intention of the parties as gathered from the language of the agreement viewed in the light of all the circumstances under which it was made . . . . Such intention must be gathered from the written instrument, construed in respect to the subject matter, the motive and purpose of making the agreement, and the object to be accomplished.

Hodgkins v. New England Telephone Co., 82 F.3d 1226, 1230 (1st Cir. 1996) (quoting *Baybutt Constr. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 919 (Me. 1983)). "Whether contract language is ambiguous is a question of law." *Town of Lisbon v. Thayer Corp.*, 675 A.2d 514, 516 (Me. 1996). A contract is ambiguous "when it is reasonably susceptible to different interpretations." *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995). When contract language is ambiguous, its interpretation is a question of fact, *McCarthy v. U.S.I. Corp.* 678 A.2d 48, 51-52 (Me. 1996), and "extrinsic evidence may be admitted and considered to show the intention of the parties." *Fitzgerald*, 658 A.2d at 1069 (citation omitted).

Paragraph 1 of the February 21, 1995, contract provides for "[t]he parking lot and roadways. . . [to] be cleaned and sweep/vacuumed two times per week" by Danco. B. Guiliani Dep. Ex. 6. The Court is persuaded that this language is ambiguous as to the ultimate disposition of the sweeping debris. Danco needed to deposit the debris it collected from cleaning the parking lot somewhere, and Mr. Guiliani's conversation with Mr. Amadei foreclosed the option of the Wal-Mart compactor. Furthermore, Ms. Poulin allegedly checked with Mr. Helterbrake before telling Mr. Guiliani that the sand would have to be hauled off site. The Court is satisfied that an issue of material fact exists regarding the intent of the parties, and that, therefore, summary judgment on Plaintiffs' claim that Defendant breached the February 21, 1995, contract is inappropriate. *See Town of Lisbon*, 675 A.2d at 516 (when an issue of fact exists regarding the intent of the parties, summary judgment is inappropriate).

Plaintiffs also contend that Defendant breached its March 15, 1995, contract with Danco for maintenance of the Augusta Sam's Club parking lot. Pursuant to this contract, Plaintiffs allege, Danco performed services for Defendant until May 31, 1995, when Sam's Club manager, Eddie Smith, terminated the contract. Danco has billed the Augusta Sam's Club for its services during the months of April and May, 1995; however, Defendant has refused to pay for these services. The determination of whether there has been a breach of contract is a question of fact. *VanVoorhees v. Dodge*, 679 A.2d 1077, 1080 (Me. 1996). The Court, therefore, denies Defendant's Motion for Summary Judgment on Count III.

D. Count IV — Breach of Oral Contracts

Count IV of Plaintiffs' Complaint alleges that Defendant breached various oral contracts it had with Danco by terminating these contracts without cause or sufficient notice. The parties do not dispute that during the fall of 1994, Danco and Defendant entered into oral agreements to provide parking

lot maintenance and cleaning services for Wal-Mart stores in Scarborough, Windham, Auburn, Farmington, Rockland, Waterville, and the Sam's Club in Augusta, Maine.[2] Plaintiffs contend that J.R. Lee, the district manager for Wal-Mart, told Mr. Guiliani that these oral contracts were Danco's to keep as long as Danco performed its job in a satisfactory manner, and further expressly promised Danco the contracts for a significant duration of time. In spite of these representations, soon after Mr. Helterbrake terminated the Augusta Wal-Mart's written contract with Danco, the remaining Wal-Mart stores, with the exception of the Auburn Wal-Mart,[3] terminated their oral contracts with Danco, for no reason and without notice. Defendant responds that the oral contracts between Danco and these other Wal-Mart stores were "terminable at will."

"While the interpretation of unambiguous language in a written contract falls within the province of the court, . . . questions of fact concerning the terms of an oral agreement are left to the trier of fact." *Moulton Cavity & Mold, Inc. v. Lyn-Flex Indus., Inc.*, 396 A.2d 1024, 1029 (Me. 1979) (citations omitted). The parties dispute whether the oral agreements were intended to be contracts of a specific duration, and whether Defendant was allowed to terminate them without cause or notice. The Court, therefore, is satisfied that Defendant's Motion for Summary Judgment on Count IV should be denied.

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[2] The Court assumes, however, that Plaintiffs' claim for breach of oral contract does not apply to Danco's oral contract to provide parking lot maintenance to the Augusta Sam's Club, since on or about March 15, 1995, Danco and Wal-Mart entered into a written contract for parking lot maintenance services for this store.

[3] Plaintiffs acknowledge that Don Jenkins, manager of the Auburn Wal-Mart, did provide Danco with notice and a reason for termination of their contract, namely the Auburn Wal-Mart's decision to utilize in-house personnel to maintain the lot during the winter months.

E. Count V — Unjust Enrichment

Plaintiffs allege in Count V that Defendant has been "unjustly enriched" by services provided by Plaintiffs, specifically Danco's hauling away of the sweeping debris from the Augusta Wal-Mart parking lot. "'[U]njust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay.'" *Hodgkins*, 82 F.3d at 1232 (quoting *A.F.A.B., Inc. v. Town of Old Orchard Beach*, 639 A.2d 103, 105 n.3 (Me. 1994)). Plaintiffs contend that to the extent the February 21, 1995, written contract between Danco and the Augusta Wal-Mart is found not to cover Danco's removal of sand from the site, Plaintffs are nevertheless entitled to relief under a theory of unjust enrichment.

In order to establish a claim for unjust enrichment a party must prove: (1) a benefit conferred upon Defendant by Plaintiffs; (2) an appreciation or knowledge by Defendant of the benefit; and (3) the acceptance or retention by Defendant of the benefit under such circumstances as to make it inequitable for Defendant to retain the benefit without payment of its value. *Aladdin Elec. Assoc. v. Town of Old Orchard Beach*, 645 A.2d 1142, 1144 (Me. 1994). The Court is persuaded that genuine issues of material fact exist with respect to each of these elements.

First, Danco's removal of sand from the site conferred a benefit upon Defendant. Second, Plaintiffs have put forth evidence suggesting that Defendant knew about this benefit. Mr. Guiliani alleges that Ms. Poulin checked with Mr. Helterbrake before telling Mr. Guiliani to haul the debris off site, and one of Defendant's employees, Mr. Amadei, was responsible for telling Mr. Guiliani that disposal of sand in the compactor would no longer be allowed. Finally, Danco has not yet received payment for this service. A reasonable factfinder could conclude that it was inequitable for Defendant to receive

Danco's services without paying for them. The Court denies Defendant's Motion for Summary Judgment on Count V.

F. Count VI — Negligence

Count VI of Plaintiffs' Complaint alleges a cause of action for negligence. Specifically, Plaintiffs allege that Defendant had a duty to protect Plaintiffs from racial discrimination while Plaintiffs performed their contractual obligations, and breached this duty by failing to prevent or correct a racially hostile atmosphere. Defendant contends that no such duty exists. Alternatively, Defendant argues that even if such a duty did exist, there is no evidence on the record to support Defendant's breach of that duty.

In order to prevail on a claim for negligence, Plaintiffs must prove: (1) a duty owed Plaintiffs by Defendant, (2) Defendant's breach of that duty; and (3) injury to Plaintiffs from the breach. *Parker v. Harriman*, 516 A.2d 549, 550 (Me. 1986). The existence of a duty is a question of law for decision by the Court. *Fish v. Paul*, 574 A.2d 1365, 1366 (Me. 1990).

Plaintiffs argue that Defendant's duty to protect Plaintiffs from racial discrimination arises from the recognized common law duty, under Maine law, on the part of a business owner to exercise reasonable care to prevent injury to business invitees. *See Pelletier v. Fort Kent Golf Club*, 662 A.2d 220, 221-22 (Me. 1995). While the Court agrees that common law imposes a duty of reasonable care upon a business owner, the traditional application of common law negligence in this area has been to protect business invitees from physical injury. *See Isaacson v. Husson College*, 297 A.2d 98, 105 (Me. 1972) ("'A possessor of land is subject to liability for physical harm caused to his invitees . . . .'") (quoting Restatement (Second) of Torts § 343 (1965)). Plaintiffs have failed to present any legal support for extending this common law duty to cases such as this one, where a plaintiff's alleged injuries are purely psychological in

nature.[4] The Court is persuaded that Mr. Guiliani's emotional injuries are more properly addressed by his claim for negligent infliction of emotional distress. As a result, the Court grants Defendant's Motion for Summary Judgment on Count VI.

G. Count VII — Intentional Infliction of Emotional Distress

In Count VII, Plaintiffs allege that Defendant intentionally and recklessly inflicted emotional distress on Mr. Guiliani. To prevail on this claim, Plaintiffs must prove that: (1) Defendant intentionally or recklessly inflicted severe emotional distress or was certain that such distress would result from its conduct; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of Defendant caused Mr. Guiliani's emotional distress; and (4) the emotional distress suffered by Mr. Guiliani was so "severe" that "no reasonable [person] could be expected to endure it." *Henriksen v. Cameron*, 622 A.2d 1135, 1139 (Me. 1993) (quoting *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979)). The Maine Supreme Judicial Court has held in the context of an intentional infliction of emotional distress claim that:

> [i]t is for the Court to determine, in the first instance whether the Defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery, or whether it is necessarily so. Where reasonable [people] may differ, it is for the jury, subject to the control of the Court, to determine whether, in a particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

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[4] While Mr. Guiliani alleges that he suffers severe headaches, he acknowledges that these headaches were caused by his severe emotional distress and anguish.

Colford v. Chubb Life Ins, Co. of America, 687 A.2d 609, 616 (Me. 1996), *cert. denied*, — U.S. —, 117 S. Ct. 2433 (1997).

Viewing the facts in a light most favorable to Plaintiffs, the Court is satisfied that Defendant's conduct may not reasonably be regarded as so atrocious or extreme as to permit recovery on this theory. Defendant, itself, did not commit any of the three allegedly discriminatory acts. Rather, Plaintiffs allege that Defendant failed to prevent or correct a hostile work environment. While such allegations, if proven, may constitute sufficient evidence of intentional discrimination, the Court finds that they do not rise to the level of intentional infliction of emotional distress. The Court, therefore, grants Defendant's Motion for Summary Judgment on Count VII.

H. Count VIII — Negligent Infliction of Emotional Distress

Count VIII of Plaintiffs' Complaint seeks relief for negligent infliction of emotional distress. In order to succeed on this claim, Plaintiffs must establish: (1) that Defendant failed to exercise reasonable care in keeping the workplace free from harassment; (2) that Defendant's failure caused Mr. Guiliani severe emotional distress; (3) that Defendant's failure would have caused a reasonable person severe emotional distress; and (4) that the harm was foreseeable. *Duplessis*, 835 F. Supp. at 683 (citing *Salley v. Childs*, 541 A.2d 1297 (Me. 1988)).

Defendant contends that the mental anguish allegedly suffered by Mr. Guiliani does not rise to the level of severity necessary for a successful negligent infliction of emotional distress claim. Mr. Guiliani alleges that the various incidents of discrimination caused him to experience emotional distress resulting in severe headaches and significant sleeplessness and nightmares. The Court is satisfied that a reasonable factfinder could determine that this mental distress was more than the "usual and insignificant emotional traumas of daily life in modern society," *Dewilde v Guy Gannett Publ'g Co.*, 797 F.

Supp. 55, 62 (D. Me. 1992), constituting instead trauma that no reasonable person could expect to endure. Defendant's Motion for Summary Judgment on Count VIII is, thus, denied.

I. Count IX — Punitive Damages

In Count IX, Plaintiffs move for punitive damages. Punitive damages are available under section 1981 when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987) (analyzing punitive damages award in section 1981 case) (quoting *Smith v. Wade*, 461 U.S. 3 0, 56 (1983)). Under Maine law, Plaintiffs are entitled to punitive damages on their common law tort claims if they can establish by clear and convincing evidence that Defendant acted with malice. *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985).

The Court is satisfied that Plaintiffs have generated sufficient facts, if viewed in a light most favorable to Plaintiffs, from which a reasonable jury could conclude that Defendant acted with malice, or with reckless indifference to Plaintiffs' federally protected rights. In general, however, punitive damages are not available in Maine for breach of contract. *See Drinkwater v. Patten Realty Corp.* 563 A.2d 772, 776 (Me. 1989). Since the Court has granted Defendant's Motion for Summary Judgment on Counts II, VI and VII, the Court narrows Plaintiffs' basis for recovery on the punitive damages count to those damages arising from Counts I, V, and VIII.

CONCLUSION

Defendant's Motion for Summary Judgment is GRANTED as to Counts II, VI and VII, and DENIED as to all other counts.

SO ORDERED.

/s/ Morton A. Brody

MORTON A. BRODY
United States District Judge

Dated this 26th day of March, 1998.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANCO, INC. and Benjamin Guiliani, Plaintiffs,	)	
v.	)	**Civ. No. 97-54-B**
WAL-MART STORES, INC., Defendant,	)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

On April 29, 1998, the Court entered judgment on a jury verdict awarding Plaintiffs, Danco, Inc. and Benjamin J. Guiliani (collectively, "Plaintiff"), $654,440 in compensatory damages. The jury found that Defendant, Wal-Mart Stores, Inc., violated Plaintiff's civil rights by subjecting him to a hostile work environment in violation of 42 U.S.C. § 1981, and breached a written contract between Plaintiff and the Augusta Sam's Club. Pursuant to Fed. R. Civ. P. 50(b) and 59(a), Defendant moves the Court for Judgment as a Matter of Law or, in the alternative, for a New Trial. A hearing on Defendant's Motion was held on June 29, 1998. For the reasons set forth below, the Court rejects each of Defendant's arguments in support of its motion, except for Defendant's claim that the jury's award of damages on Plaintiff's civil rights claim is excessive. Upon consideration of the evidence presented at trial and the arguments presented by the parties in connection with this issue, the Court is persuaded that remittitur is warranted.

I. STANDARD OF REVIEW

On a Fed. R. Civ. P. 50(b) motion for judgment as a matter of law, the Court "'examine[s] the evidence and the inferences reasonably to be drawn therefrom in the light most favorable to the nonmovant.'" *Colasanto v. Life Insurance Co. of North America*, 100 F.3d 203, 208 (1st Cir. 1996) (quoting *Wagenmann v. Adams*, 829 F. 2d 196, 200 (1st Cir. 1987)). The Court will override a jury verdict only if the evidence "'is so one-sided that the movant is plainly entitled to judgment, for reasonable minds could not differ as to the outcome.'" *Id.* (quoting *Gibson v. City of Cranston*, 37 F.3d 731, 735 (1st Cir. 1994)).

Pursuant to Fed. R. Civ. P. 59(a), the Court may order a new trial and set aside a verdict "when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice.'" *Ahern v. Scholz*, 85 F.3d 774, 780 (1st Cir. 1996) (citations omitted). "'[T]he district court has broad legal authority to determine whether or not a jury's verdict is against the "clear weight of the evidence."'" *Id.* (quoting *de Perez v. Hospital del Maestro*, 910 F.2d 1004, 1006 (1st Cir. 1990)). The district court, however, "'cannot displace a jury's verdict merely because he disagrees with it or would have found otherwise in a bench trial.'" *Id.* (quoting *Milone v. Moceri Family, Inc.*, 847 F.2d 35, 37 (1st Cir. 1988)).

II. DISCUSSION

Defendant asserts four arguments in favor of its Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial. The Court addresses each in turn.

A. An Independent Contractor May Not Bring a Hostile Work Environment Claim Pursuant to 42 U.S.C. § 1981.

Defendant reiterates its argument, raised during the course of trial, that Plaintiff, as an independent contractor, is precluded from claiming that Defendant violated 42 U.S.C. § 1981 ("§ 1981") by creating a hostile work environment. Defendant contends that the hostile work environment theory was crafted under Title VII as a method of proving racial discrimination, and is limited in its application to the employer/employee relationship.

The parties have not cited, and the Court's research does not disclose, any authority directly addressing this issue. In *Wright v. State Farm Mutual Automobile Insurance Co.*, 911 F. Supp. 1364, 1376 (D. Kan. 1995), *aff'd*, 94 F.3d 657 (10th Cir. 1996), the court reached the merits of an independent contractor's § 1981 claim for a hostile work environment. The court, however, granted summary judgment in favor of the defendant on the claim, without discussing whether such a claim was allowable. *Id.*

42 U.S.C. § 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). The phrase "make and enforce contracts" is defined to include the "making, performance, modification, and termination of contracts, and the *enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship*." 42 U.S.C. § 1981(b) (emphasis added). Unlike Title VII which on its face concerns discrimination in employment relationships, the plain language of § 1981 indicates that the statute applies to "all persons," and courts have consistently applied § 1981 to independent contractors. *See e.g., Miller v. Advanced Studies, Inc.*, 635 F. Supp. 1196, 1199 n.4 (plaintiff s claim under § 1981 is not affected by his status as an independent contractor); *Wright*, 911 F. Supp. at 1376; *see also Springer v.*

Seamen, 821 F.2d 871 (1st Cir. 1987) (involving § 1981 suit brought by black independent contract postal carrier against Postal Service and other individuals). The Court remains persuaded that Plaintiff may bring a hostile work environment claim pursuant to § 1981, and denies Defendant's motion as it relates to this argument.

B. Plaintiff did not Adequately Plead a Hostile Work Environment Claim

Defendant next argues that because Plaintiff failed to allege that he was the victim of a hostile work environment in his Complaint, he was not entitled to proceed upon this theory. As with Defendant's first argument, the Court discussed and resolved this issue during the course of trial. The Court remains satisfied that Plaintiff has met his burden of notice pleading with respect to his civil rights claim. *See DeNovellis v. Shalala*, 124 F.3d 298, 310 n.6 (1st Cir. 1997) (plaintiff need not allege a hostile work environment in his complaint because notice pleading only requires that a plaintiff "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," not the "precise legal theories upon which the plaintiff bases his right to recovery") (citations omitted). In his Complaint, Plaintiff described Defendant's conduct and alleged a violation of Plaintiff's civil rights pursuant to § 1981. Plaintiff then articulated a hostile work environment theory before the Court in response to Defendant's Motion for Summary Judgment. *See id.* (hostile work environment satisfactorily presented to court where plaintiff failed to allege hostile work environment theory in complaint, but raised theory in reply brief to defendant's motion for summary judgment). The Court finds that Defendant had sufficient notice of Plaintiff's hostile work environment argument and, accordingly, denies Defendant's motion insofar as it alleges that Plaintiff failed to adequately plead this claim.

C. Evidence was Legally Insufficient to Support the Hostile Work Environment Verdict

Defendant's third argument is that the evidence introduced at trial was insufficient to support the jury's verdict in favor of Plaintiff on his hostile work environment claim. Whether Defendant's conduct was sufficiently pervasive to create a hostile or offensive work environment depends on the "gravity as well as the frequency of the offensive conduct." *DeNovellis*, 124 F.3d at 311 (analyzing Title VII hostile work environment claim). The Court is satisfied that based upon the evidence introduced at trial, including evidence that the racial graffiti allegedly remained on the parking lot for a period of several months, the jury's verdict was not against the weight of the evidence, nor would a reasonable factfinder be compelled to reach a different conclusion. Therefore, the Court denies Defendant's Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial as it relates to Defendant's argument that the evidence was insufficient to support the jury's verdict.

D. Jury's Award of $650,000 is Inconsistent and Excessive

Defendant's fourth argument is that the jury's award of $650,000 to Plaintiff for violation of his civil rights is inconsistent with the remainder of the verdict and excessive. Defendant contends that the wording of Question #6 on the Special Verdict Form, requesting the jury's determination of damages on two of Plaintiffs breach of contract claims, resulted in an inconsistent verdict. Specifically, Defendant draws the Court's attention to the following language in Question #6:

> Subtract from this amount any portion of the damages you may have awarded in question #2 [civil rights damages] that is attributable to the violation of Plaintiff's civil rights as it relates to breach of contract. Do not subtract any damages

you may have awarded in question #2 for pain, suffering, mental anguish, and other non-pecuniary damages, if any.

Because the jury awarded $4,440 in response to this question, Defendant contends that the $4,440 award is inconsistent with the $650,000 award on Plaintiff's hostile work environment claim which also included non-pecuniary damages. The Court is not persuaded by Defendant's interpretation of the jury's answers, and further rejects Defendant's argument that the $650,000 award could not have included any damages for emotional distress because the jury awarded no damages on Plaintiff's claim for negligent infliction of emotional distress. The Jury Instructions stated that any damages awarded for negligent infliction of emotional distress were to be "separate from and awarded in addition to, any award of mental anguish, pain or suffering." Jury Instructions at 16.

Moreover, Defendant failed to object to the wording of Question #6. By failing to object before the jury was dismissed, Defendant waived any claim of inconsistency unless "the alleged error seriously affected the fairness or integrity of the trial." *Moore v. Murphy*, 47 F.3d 8, 11 (1st Cir. 1995) (plain error doctrine reserved for use "in only the most egregious circumstances"); *see also Wilson v. Maritime Overseas Corp.*, No. 97-1804, 1998 WL 374902, at *4 (1st Cir. July 10, 1998) ("[i]t is an ironclad rule in this circuit that failure to renew objections after the charge constitutes waiver of any claim of error.") (citations omitted). The Court is satisfied that any error in the wording of Question #6 does not rise to the level of plain error, and denies Defendant's motion insofar as it alleges that the jury's award of damages on Plaintiff's civil rights claim is inconsistent with the remainder of the verdict.

Defendant also argues that it should be entitled to a new trial because the jury's award of damages on Plaintiff's hostile work environment claim is excessive. While Defendant's initial Motion for Judgment as a Matter of Law and/or a New Trial

did not contain a motion for remittitur, on July 2, 1998, Defendant filed a Supplementary Memorandum of Law in Support of its Motion for New Trial or for Remittitur. Plaintiff responded to this Supplementary Memorandum on or about July 27, 1998.

Under the federal standard, "a damage determination will withstand scrutiny unless it is 'grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.'" *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1161 (1st Cir. 1996) (quoting *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995)). The Court may grant a remittitur or a new trial when the award exceeds "any rational appraisal or estimate of the damages that could be based upon the evidence before it." *Eastern Mount. Platform Tennis, Inc. v. Sherwin-Williams Co.*, 40 F.3d 492, 502 (1st Cir. 1994) (quoting *Kolb v. Goldring, Inc.*, 694 F.2d 869, 872 (1st Cir. 1982)). In calculating a remittitur, the First Circuit applies the "least intrusive" standard. *Conjugal Partnership v. Conjugal Partnership*, 22 F.3d 391, 398 (1st Cir. 1994). "Under this standard, the remittitur amount should reduce the verdict 'only to the maximum that would be upheld by the trial court as not excessive.'" *Id.* (quoting *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1328 (2d Cir. 1990)).

While the Court is extremely reluctant to disturb the jury's damages award, in light of all the evidence introduced at trial, the Court concludes that the compensatory damages awarded by the jury for violation of Plaintiff's civil rights are so excessive as to warrant a remittitur. Although the evidence at trial supported the jury's finding that Plaintiff was treated improperly and unlawfully, the Court is persuaded that the jury could not reasonably have awarded Plaintiff more than $300,000 on his hostile work environment claim given the evidence of compensatory damages presented by Plaintiff and the fact that Plaintiff's punitive damages claim was dismissed

during the course of trial. If Plaintiff accepts this reduced award, leaving him a total damages award of $304,440, the Court will deny Defendant's motion for a new trial.[1]

III. CONCLUSION

Defendant's Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial is DENIED, except as to Defendant's claim that the jury's award of damages on Plaintiff's civil rights claim is excessive. Plaintiff shall have 30 days from the date of this Opinion in which to decide whether to accept remittitur to the amount stated above, or to proceed to a new trial.

SO ORDERED.

/s/ Morton A. Brody

MORTON A. BRODY
United States District Judge

Dated this 5th day of August, 1998.

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[1] The Court does not consider this case to be one in which the verdict is the result of passion or prejudice so as to make remittitur improper. *See* 11 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2815, at 165 (2d ed. 1995).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DANCO, INC. and BENJAMIN GUILIANI,
Plaintiffs, Appellees/Cross-Appellants,
v.
WAL-MART STORES, INC.,
Defendant, Appellant/Cross-Appellee.

Nos. 98-2101, 98-2269.

ORDER OF THE EN BANC COURT

Before

TORRUELLA, Chief Judge, SELYA, BOUDIN, STAHL, LYNCH and LIPEZ, Circuit Judges.

Entered June 11, 1999

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court En Banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
PHOEBE MORSE, Clerk

By: /s/ Janice M. O'Neil
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANCO, INC. and	)	
Benjamin Guiliani,	)	
Plaintiffs,	)	
	)	
v.	)	**Civil No. 97-0054-B**
	)	
WAL-MART STORES, INC.,	)	
Defendant,	)	

JUDGMENT

This matter having come before the Court, Honorable Morton A. Brody presiding and a jury, and the issues having been duly tried, and pursuant to the verdict of the jury,

IT IS ADJUDGED that JUDGMENT is entered for the plaintiff in the amount of Six Hundred Fifty Four Thousand, Four Hundred and Forty Dollars and no cents ($654,440.00) as against the defendant.

Dated this 29th day of April, 1998.

WILLIAM S. BROWNELL, CLERK

By: /s/ Harriett D. Jefferson
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANCO, INC. and	)	
Benjamin Guiliani,	)	
Plaintiffs,	)	
	)	
v.	)	**Civil No. 97-0054-B**
	)	
WAL-MART STORES, INC.,	)	
Defendant,	)	

AMENDED JUDGMENT

This matter having come before the Court, Honorable Morton A. Brody presiding and a jury, and the issues having been duly tried, and pursuant to the verdict of the jury, and pursuant to the Plaintiffs' acceptance of a remittitur;

JUDGMENT is hereby entered for the plaintiffs, in the amount of three hundred and four thousand, four hundred and forty dollars ($304,440).

Dated this 8th day of September, 1998.

WILLIAM S. BROWNELL, CLERK

By: /s/ Harriett D. Jefferson
Deputy Clerk

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIII

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

No. 99-434

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

DANCO, INC., and BENJAMIN GUILIANI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

HAROLD J. FRIEDMAN
Counsel of Record
KAREN FRINK WOLF
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CORPORATE DISCLOSURE STATEMENT

Respondent Danco, Inc. has no parent company(ies), nor does any publicly held company own any of Danco, Inc.'s stock.

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STATEMENT OF THE CASE

1. In 1988, Benjamin Guiliani (hereinafter "Mr. Guiliani"), a Mexican-American, founded Danco, which he later lawfully incorporated as Danco, Inc. (hereinafter "Danco"). The purpose of the company was to maintain and clean the parking lots of various retail enterprises. (App. 1a).

2. On September 15, 1994, Danco entered into a contract with Wal-Mart Stores, Inc. (hereinafter "Wal-Mart") to perform parking lot maintenance by removing litter and sand three times per week. (App. 1a).

3. In October of 1994, Mr. Guiliani saw a Wal-Mart employee, Bob Amadei, in the Augusta, Maine, store parking lot shortly before he viewed the spray-painted words "White Supremacy" on the Wal-Mart lot where he typically unloaded his cleaning equipment. Mr. Guiliani's son saw Amadei with a spray can immediately before he saw the graffiti. Mr. Guiliani brought the graffiti to the attention of store manager, Curtis Scheffe, who agreed to investigate and remove the graffiti. However, the words remained for more than two months until they wore away naturally. Mr. Scheffe concluded that no one at Wal-Mart was willing to say they knew anything about the incident, and failed to take corrective action. (App. 2a, 3a).

4. On October 14, 1994, Mr. Guiliani reported to Mr. Scheffe that another Wal-Mart employee, Scott Hamlin, had told him "I don't like your kind." He explained that when Mr. Guiliani asked what he meant, Mr. Hamlin said "Puerto Ricans" and pushed Mr. Guiliani. Mr. Guiliani also reported this incident to Mr. Scheffe and to the Augusta Police Department. Again, Mr. Scheffe failed to take any corrective action. (App. 3a).

5. In November of 1994, Mr. Guiliani was subjected to a racial slur from Mr. Hamlin, who yelled the slur at Mr. Guiliani in Wal-Mart's lot from a passing vehicle. Mr. Scheffe again was notified, but did not discipline Mr. Hamlin. (App. 3a).

6. These incidents on Wal-Mart's premises directly interfered with Mr. Guiliani's work such that he began to perform his duties during the day rather than at night, as had been his custom in the past, and he remained fearful for his and his family's safety. (App. 23a).

7. In January of 1995, James Helterbrake replaced Curtis Scheffe as the Augusta Wal-Mart manager. Mr. Guiliani informed Mr. Helterbrake of the prior racial incidents and his contact with the police. Mr. Helterbrake became angry, suggesting that Mr. Guiliani was overreacting and thereafter treated Mr. Guiliani in a hostile manner. (App. 20a).

8. In late March of 1995, while Mr. Guiliani and his son were completing their cleaning duties, a sanding contractor began sanding the ice while Mr. Helterbrake watched. The following day Mr. Helterbrake terminated Danco's contract on the grounds that he had not cleaned up the sand properly the previous night and informed Mr. Guiliani that he did not wish to see him around the Augusta Wal-Mart store again. (App. 20a).

9. In March of 1997, Mr. Guiliani and Danco sued Wal-Mart, alleging violation of 42 U.S.C. § 1981 (hereinafter "§ 1981") as well as breach of contract, unjust enrichment, negligent and intentional infliction of emotional distress, and denial of public accommodations. (App. 4a).

10. In April, 1997, the case was tried before a jury. A wrongful termination claim and a hostile environment claim under § 1981 were presented to the jury along with the state contract and tort actions. The District Court instructed the jury, without any objection from Wal-Mart, Danco and Guiliani were a single person, for purposes of their deliberations and utilized instructions standard for a hostile work environment theory under Title VII and § 1981, omitting references to "employee" because of Plaintiffs' independent contractor status. (App. 4a, 5a).

11. By special verdict, the jury found in favor of the Plaintiffs on the hostile work environment theory under § 1981, on the claim for negligent infliction of emotional distress, and on one of several contract claims. The jury awarded $650,000 on the hostile environment claim and assigned no damages for the emotional distress claim. The verdict was reduced to $300,000 after a remittitur was granted by the District Court, to which Plaintiffs consented. (App. 5a).

12. The First Circuit Court of Appeals affirmed the entirety of the District Court's decision and agreed that § 1981 permits independent contractors to bring hostile work environment claims. (App. 9a).

13. Wal-Mart petitioned to the First Circuit for rehearing en banc. On June 11, 1999, by Order of the En Banc Court, the petition was denied. (App. 45a).

14. Wal-Mart filed a Petition for a Writ of Certiorari to the United States Supreme Court on or about September 9, 1999, seeking review or summary reversal of the First Circuit Court of Appeals decision affirming the District Court judgment. The Petition of Wal-Mart should be denied.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT AN INDEPENDENT CONTRACTOR MAY BRING A HOSTILE WORK ENVIRONMENT CLAIM UNDER 42 U.S.C. § 1981 BECAUSE THAT STATUTE APPLIES TO ALL PERSONS' RIGHT TO BE FREE FROM RACIAL DISCRIMINATION IN CONTRACTUAL RELATIONSHIPS.

The legislative history of 42 U.S.C § 1981 (hereinafter § 1981) is important to understanding why the Court of Appeals decision was correct and need not be reviewed by the United States Supreme Court. Congress enacted § 1981[1] as part of the Civil Rights Act of 1866 pursuant to the congressional power to eradicate slavery as provided by the Thirteenth Amendment. The purpose of § 1981 has always been to protect *all persons* from racial discrimination and to promote this country's national vision of a society where contractual opportunities are equal for all persons. *See* H.R. No. 102-40(II) (1991), *reprinted in* 1991

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[1] 42 U.S.C. § 1981 (1986) stated:

> *All persons* within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. (emphasis added).

U.S.C.C.A.N. 694 (one of the purposes of the Act is to "strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination"). Indeed, "§ 1981 is the only federal law banning race discrimination in the operation of all contracts. It has been a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts." *Id.* (discussing Section 12 "Restoring Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts").

The Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) ruled that § 1981's phrase "make and enforce contracts" provided a remedy only for racial discrimination in pre-formation conduct and for discrimination which affected a party's right to enforce a contract by legal process, namely the right to sue, be a party, and or give evidence. *Id.* at 177-78. The *Patterson* Court expressly held a racially hostile work environment claim was not actionable under § 1981 because even though the environment might be discriminatory in the terms, conditions and privileges of a contract, it did not impede the "making" or "enforcement" of a contract. *Id.* at 178-79. *Patterson* also held that termination of a contract on the basis of racial animus did not state a § 1981 claim. *Id.* at 179.

Congress, dissatisfied with this decision which it felt unduly restrained the intended broad reach of § 1981, enacted the Civil Rights Act of 1991, specifically to overrule the *Patterson* decision. *See* H.R. Rep. No. 102-40(I), at 141 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 670. The 1991 amendments added § 1981(b) which defined the phrase "make and enforce contracts" to include "the making,

performance, modification, termination of contracts, and the *enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*" 42 U.S.C. § 1981(b) (emphasis added). Accordingly, the statute now extends to *all* conduct associated with the contractual relationship.[2]

One way of proving liability under § 1981 is to show that the plaintiff was subjected to a hostile work environment. The phrase "hostile work environment" is a term of art describing a particular theory of recovery under the civil rights statutes. Its use originated in cases interpreting the civil rights statute for employees, Title VII. *See e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (discriminatory conduct, which is severe and pervasive enough to create an objectively hostile work environment,

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[2] 42 U.S.C. § 1981 (1998) states:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

violates Title VII).[3] The operative language in Title VII is found in 42 U.S.C. § 2000e-2(a)(1), which makes it unlawful for an employer "to discriminate against any individual with respect to his *compensation*, *terms*, *conditions*, or *privileges* of employment because of such individual's race, color, religion, sex, or national origin." *Id.* (emphasis added). Likewise, § 1981 contains substantially this same language, providing that it is unlawful to discriminate on the basis of race with respect to the enjoyment of all "*benefits*, *privileges*, *terms*, and *conditions*" of the contractual relationship. *See* § 1981(b) (emphasis added).

The United States Supreme Court has confirmed that this language, referring to the "terms, conditions, or privileges" of the subject relationship, describes "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 59 (1986). In essence, the 1991 amendments used the language of Title VII in order to provide a remedy for all contractors against racial discrimination occurring at the beginning, at the middle or at the end of the contractual relationship.

The elements of proof and method of analysis of a hostile environment are the same under Title VII and § 1981.

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[3] The hostile environment theory can be distinguished from discrimination based on a specific adverse employment action which requires a plaintiff to show that he is a member of a protected class, he is qualified for a particular position, he was terminated or denied a promotion, and he was replaced by a person who was not in a protected class. *See Defenbaugh-Williams v. Wal-Mart Stores Inc.*, 156 F.3d 581, 586 (5th Cir. 1998), *aff'd en banc*, 182 F.3d 333 (5th Cir. 1999).

See Amin v. Quad/Graphics, Inc., 929 F. Supp. 73, 81 (N.D. N.Y. 1996) (elements for claim based on hostile work environment are same under Title VII and § 1981); *accord Villanueva v. Wellesley College*, 930 F.2d 124, 127 n.2 (1st Cir. 1991) (analysis of § 1981 claim is "substantially identical" to analysis of Title VII claim). Although the elements of a claim of discrimination under § 1981 and under Title VII are essentially identical, the crucial distinction that Defendant apparently fails to appreciate is that the latter deals with discrimination in all contractual relationships, while the former deals with discrimination in only employment relationships. *See Johnson v. City of Fort Wayne, Indiana*, 91 F.3d 922, 940 (7th Cir. 1996).

While the amended § 1981 is often characterized as prohibiting racial discrimination in all aspects of employment, that only acknowledges the obvious fact that by far the majority of such cases arise in the employer/employee context. *See* Decision of Court of Appeals (App. 9a). Section 1981(b) only speaks in terms of the benefits, privileges, terms, and conditions of the *contractual* relationship, nowhere mentioning the employment context. In fact, the words "employment," "employer" or "employee" are completely absent from § 1981, making any argument that such a limitation exists contrary to the plain language of the statute. *See generally* 42 U.S.C. § 1981.[4]

The Court of Appeals below recognized the importance of the absence of a distinction between the types of contracts to which § 1981 could be applied, and correctly held that

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[4] The word "contract" is used in § 1981 in its basic legal meaning, not a specialized labor law meaning. *See Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998).

independent contractors are indeed just as entitled as employees to bring hostile work environment claims under § 1981. As the Court of Appeals stated, "[T]here is nothing in the legislative history to suggest that Congress had any objection to providing similar benefits to independent contractors and the language it used in its amendment applies as readily to one as to the other." (App. 9a). Accordingly, Wal-Mart's Petition for a Writ of Certiorari should be denied.

II. THE COURT OF APPEALS CORRECTLY FOLLOWED ALL OF THE RELEVANT PRINCIPLES OF STATUTORY CONSTRUCTION AND NEITHER A REVIEW NOR A SUMMARY REVERSAL ARE WARRANTED.

Because the Court of Appeals decided correctly and its decision did not implicate any issues where there is a conflict among the circuits below, there is no need for the Supreme Court to spend its scarce judicial resources reviewing this case. The Court of Appeals below recognized that the precise issue before it had not yet been addressed by many courts and rendered an opinion, which reflected a thorough consideration of all of Wal-Mart's arguments and which will become solid precedent for courts facing similar claims in the future. No matter of constitutional dimensions is affected. Therefore, Wal-Mart's petition for a writ of certiorari or in the alternative a summary reversal must be denied.

A. The plain language of § 1981 embraces hostile work environment claims by independent contractors.

The plain language of § 1981, entitled "Equal Rights under the Law," confirms that the statute applies to all persons, not just employees. As the statute states, "[a]ll

persons . . . have the same right . . . to make and enforce contracts . . . enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). The phrase "make and enforce" covers a broad spectrum, including the "making, performance, modification, and the enjoyment of *all* benefits privileges, terms, and conditions of the contractual relationship." *Id.* at § 1981(b) (emphasis added).

Section 1981's expansive language obviously includes independent contractors and indeed § 1981 has long been held to apply to them. *See, e.g., Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 110 (3d Cir. 1988). The language of a statute, when plain, is conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); *see also Engine Mfr's Ass'n v. U.S. E.P.A.*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (explaining that if the text of a statute clearly requires a particular outcome, then the mere fact that is does so implicitly rather than explicitly does not mean it is ambiguous or that the plain language should not control).

Furthermore, Congress need not have specifically considered or articulated each and every possible type of contract § 1981 would protect in order for its aim to include racially discriminatory harassment of independent contractors, when it passed the 1991 amendments to § 1981. This is because statutory prohibitions often go beyond the principal evil to address reasonably comparable evils. *See Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75, 78 (1998). The *Oncale* Court focused on statutory language when it rationalized that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

In this case, the Court of Appeals did not find the language of § 1981 ambiguous, and thus it did not need to resort to other methods of statutory construction. This is in accord with the rule that if there is a construction that gives effect to every word and clause of the statute in question, that construction will be preferred. *Negonsott v. Samuels*, 507 U.S. at 104 (citing *Moskal v. United States*, 498 U.S. 103, 109-10 (1990)). The Court of Appeals noted there was no reason that Mr. Guiliani's and Danco's contract with Wal-Mart would not have included an implicit contractual benefit or term that Mr. Guiliani would not be subjected to a racial epithets, graffiti, and violence in his work environment while he fulfilled his contractual agreement with Wal-Mart. (App. 8a). Such a finding is supported by the plain language of § 1981, which prevents discrimination in all aspects of contractual relationships. Accordingly, Wal-Mart's petition for review should be rejected.

B. The rules that remedial statutes should be broadly construed and that the will and intentions of Congress should be given effect support the Court of Appeals interpretation of § 1981.

Wal-Mart argues that although § 1981 does apply to both independent contractors and employees in some respects, it does not in others. Specifically, Wal-Mart asserts that while § 1981 proscribes discrimination in the formation, termination and *conditions* of employees' contractual relationships, it only applies to discrimination in the formation or termination, but *not* the conditions of independent contractors' contracts. Wal-Mart's preferred interpretation of § 1981 focuses more on the meaning of words which are absent from the statute, than on the words which are present and embodied in the express statutory

language. This is not in accord with how the Supreme Court has historically examined remedial statutes. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (noting that the lack of a statutory provision in Title VII permitting damages which were intangible or were not economic in nature would not be construed to impose a limit on such damages).

Remedial statutes like § 1981 should be interpreted broadly. *See Voris v. Eikel*, 346 U.S. 328, 333 (1953) (holding that when a statute is remedial in nature, it "must be liberally construed in conformance with its purpose, and in a way that avoids harsh and incongruous results"); *see also L.N. McDonald v. Santa Fe Trail Transportation Comp.*, 427 U.S. 273, 289 (1976) (discussing the remedial goals of § 1981 and broadly construing its language to disallow discrimination against both whites and non-whites). Congress has emphasized that it will not tolerate a narrow and parsimonious construction of federal civil rights laws, but rather requires a broad construction that provides maximum protection against discrimination. *See* 42 U.S.C. § 1107 ("All federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.")

Congress' 1991 decision to amend § 1981 so that "mak[ing] and enforc[ing] contracts" was more broadly defined to include "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," § 1981(b), should not be misconstrued. Notably, Congress chose to use language which closely tracked the Title VII

language,[5] which had been consistently interpreted to embrace hostile work environment claims. *See Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144-45 (1990) (when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted similarly). Congress clearly wanted to do more than insure that Wal-Mart would not discriminate in its decision to form a contract or terminate a contract with Mr. Guiliani and Danco based on race. Congress wanted to be certain that Wal-Mart would be held legally responsible if it took no remedial measures to protect Mr. Guiliani and Danco from being forced to endure pervasive, hostile, racially discriminatory harassment during all phases of the contractual relationship. The broad reach of § 1981 thus requires that the hostile work environment theory be available to independent contractors.

Wal-Mart argues, without any supporting authority, that because employees and independent contractors enjoy different levels of independence from their work sites, independent contractors should be prohibited from having any legal recourse whatsoever when only the "benefits, privileges, terms and conditions" of their contract are infringed. Yet, Wal-Mart appears ready to concede that the protections are unaltered when the discrimination occurs in the formation or termination of the relationship. Wal-Mart's interpretation is directly contradictory to the express

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[5] Discrimination in the "terms conditions or privileges of employment" is prohibited by Title VII. *See* 42 U.S.C. § 2000e-2(a)(1); *see also Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75 (1998) (explaining that this language "evinces a congressional intent to strike at the entire spectrum of disparate treatment . . . in employment" and that its application should not be narrowly construed.)

language of § 1981, as amended, and would serve to significantly undermine the explicit expressed intention of the 1991 amendments to overrule the *Patterson* decision, and "bar all race discrimination in contractual relations." *See* H.R. Rep. No. 102-40(I), at 92, *reprinted in* 1991 U.S.C.C.A.N. 549, 630.

According to Wal-Mart's interpretation, if Mr. Guiliani had been a Wal-Mart employee subject to a hostile environment created by Wal-Mart employees, he would have had the right under § 1981 to bring his claim; but as an independent contractor, working at Wal-Mart's premises he has no remedy from a racially hostile environment created by Wal-Mart employees.[6] In essence, Wal-Mart is asserting that its employees are only required to treat their fellow Wal-Mart co-workers with dignity and respect, whereas independent contractors can be made to endure racially derogatory epithets and graffiti, as well racially motivated violence, without any recourse under the nation's civil rights laws. Certainly such a result was not the intent of Congress when it enacted § 1981 or when it amended § 1981 in 1991. The Court of Appeals recognized the important reasons behind the amendment to § 1981, and its decision need not be reviewed.

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[6] Wal-Mart's conclusion that Mr. Guiliani's and Danco's freedom to terminate the contract with Wal-Mart provides adequate protection from a racially hostile work environment is nonsensical since by that same theory, an employee can also avoid racial discrimination in the workplace, and Wal-Mart agrees that employees have better protection from discrimination under § 1981. Moreover, Mr. Guiliani and Danco could be subjected to claims by Wal-Mart for contract breach for simply walking away in the face of racial discrimination.

C. The historical distinction between independent contractors and employees is irrelevant to the analysis of § 1981, which applies to all contracts.

As the First Circuit Court noted, the historical distinction between independent contractors and employees does not change how hostile work environment claims under § 1981 are analyzed. As mentioned above, § 1981 has long been held to apply to independent contractors. *See, e.g., Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 110 (3d Cir. 1988) (permitting independent contractor's § 1981 claim to go to jury); *Wright v. State Farm Mutual Auto Insurance Company*, 911 F. Supp. 1364, 1376 (D. Kan. 1995) (court assumed without discussion that an independent contractor could bring a § 1981 hostile work environment claim but dismissed case on the merits); *Miller v. Advanced Studies Inc.*, 635 F. Supp. 1196, 1199 n.4 (N.D. Ill. 1986) (noting that the plaintiff's § 1981 claim was not affected by the employee/independent contractor distinction).[7]

The Supreme Court has confirmed that the 1991 amendments to § 1981 apply to "all contracts." *See Rivers v. Roadway Express*, 511 U.S. 298, 304 (1994) (noting specifically that former § 1981, and hence the 1991 amendments to § 1981, were not limited to employment).

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[7] Since the decision in *Runyon v. McCrary*, 427 U.S. 160 (1976) (community recreational center could not deny membership to applicant on the basis of race), where the court held that § 1981 "prohibits racial discrimination in the making and enforcement of private contracts," § 1981 has been applied to a wide variety of contracts outside of the employment context. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (Justice Brennan concurring in part and dissenting in part) (collecting contract cases brought under § 1981 which did not involve employment contracts).

The meaning that Wal-Mart attempts to attach to the lack of a distinction between independent contractors and employees in the statutory language or legislative history of the 1991 amendments to § 1981 borders on the ludicrous. *See generally*, H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549; and H.R. Rep. No. 102-40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 694. Wal-Mart's assertion that independent contractors are unprotected by all of § 1981 and by implication have no protection from racial discrimination in their work environments is harsh and contrary to what Congress intended. *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 189 (1989) (Brennan, J., concurring in part and dissenting in part) ("civil rights should be construed to further our Nation's commitment to the eradication of racial discrimination," not to adopt "a formalistic method of interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal.").

Section 1981 is virtually the *only* anti-discrimination statute available for independent contractors, like Mr. Guiliani and Danco. *See Jean Anderson Hierarchy v. Allstate Life Insur. Co.*, 2 F. Supp. 2d 688 (E.D. Pa. 1998) (precluding independent contractors from seeking remedies under Title VII and the Fair Labor Standards Act, and severely limiting their common law tort actions).[8] Stripping independent contractors of the full statutory protection § 1981 provided to employees would in essence leave all

[8] Commentators have discussed the problem of limited avenues for independent contractors to assert claims of discrimination and noted that § 1981 is one of the only vehicles available for independent contractors to assert racial discrimination. *See generally* Lewis L. Maltby & David C. Yamada, 38 BOSTON L. REV. 239, 258 (March 1997).

independent contractors vulnerable to racial discrimination in their workplaces without recourse. It would have been counterintuitive for Congress to broaden the application of § 1981 such that an even greater disparity was created between the rights of employees and independent contractors to fight discrimination. Therefore Wal-Mart's writ must be denied.

D. There is no policy reason that should preclude independent contractors from bringing hostile work environment claims under § 1981.

Wal-Mart's contentions that it would be awkward or excessively burdensome to take reasonable precautions to protect both its employees and its independent contractors from racially hostile environments were properly deemed an exaggeration by the Court of Appeals, *see* (App. at 9a), and should not be grounds for granting a writ of certiorari here. The Court of Appeals noted that the requirements for showing a hostile work environment are just as stringent for non-employees as for employees, both of whom must similarly show:

> 1) that the plaintiff was exposed to comments, jokes, or acts of a racial nature by the defendant's employees; and
>
> 2) that the conduct had the purpose or effect of interfering with the plaintiff's work performance or created an intimidating, hostile or offensive work environment.

(App. at 13a) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20-22 (1993)). Moreover, a defendant will ordinarily

only be liable for harassment by low-level employees if management level employees knew or should have known about it. *See Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999).

Although *Harris* and other discrimination cases explain the elements for hostile environment claim under Title VII, that analysis has been held to be substantially identical to that utilized under § 1981. *See Defenbaugh-Williams v. Wal-Mart Stores Inc.*, 156 F.3d 581, 587 (5th Cir. 1998), *aff'd en banc*, 182 F.3d 333 (5th Cir. 1999) (explaining that claims of racial discrimination brought under § 1981 are governed by the same evidentiary framework applicable to Title VII employment discrimination claims). In general, courts have had no problem utilizing the Title VII hostile environment analysis in § 1981 actions involving employees, and there is no reason to think that the circumstances of independent contractors would alter or make more cumbersome this analysis. *See Williams v. Carrier Corp.*, 889 F. Supp. 1528, 1530 (M.D. Ga. 1995) (explaining that § 1981 applies to hostile environment claims as well as "all phases and instances of the contractual relationship" and citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304 (1994)).

The Court of Appeals opinion did not alter the standard requirements for succeeding on a hostile environment claim. Thus, Wal-Mart need not fear that it will obligated to go to extreme measures to avoid civil rights actions, if this Court denies its petition. Wal-Mart is required to do no more for its independent contractors in maintaining a discrimination free work environment, than it is required to do for its employees. It simply must enforce its discrimination prevention policies regarding those individuals and premises that are under its control. Surely such a requirement is not

new or unique and cannot be considered awkward or burdensome.

Furthermore, a prerequisite for liability for a hostile work environment is that there is something the employer can do to remedy the environment. *See Witt v. Roadway Express*, 880 F. Supp. 1455 (D. Kan. 1995), *rev'd in part on other grounds*, 136 F.3d 1424 (10th Cir. 1998) (employer may be liable under § 1981 for failing to remedy or prevent hostile work environment of which management level employees knew, or in the exercise of reasonable care should have known). Wal-Mart's argument that its written Harassment/ Inappropriate Conduct Policy could not apply to or be disseminated to all of its independent contractors fails to grasp its policy's purposes. The purposes of the Harassment/ Inappropriate Conduct Policy are to ensure that racial harassment by Wal-Mart employees will not be tolerated, *regardless* of whether the victims of such discrimination are other Wal-Mart employees or independent contractors.

There simply is no authority which would suggest that a person who lawfully invokes incorporation laws and chooses to earn his living as an independent contractor, thereby forfeits his § 1981 right to be free of racially based harassment and hostility in his work environment. The evidence in this case clearly showed that Wal-Mart failed to take reasonable steps to prevent and promptly correct the racially hostile behavior. It failed to adequately investigate racial incidents and violence, and in fact, even remove the racist "White Supremacy" graffiti from the parking lot that Mr. Guiliani maintained for Wal-Mart. Likewise, Plaintiff Guiliani did everything he could to prevent the racial incidents from reoccurring by promptly reporting the incidents to both Wal-Mart management and the police.

It would not have been awkward or unduly burdensome for Wal-Mart's supervisory employees to have taken reasonable remedial measures after learning of the discrimination to which Mr. Guiliani was being subjected at the hands of Wal-Mart employees on its premises.

Wal-Mart's assertion that applying § 1981 to independent contractors' hostile environment claims would be unworkable is axiomatic. This Court need not grant certiorari to review Wal-Mart's strained attempts to unduly narrow the evil that Congress sought to correct with the 1991 civil rights amendments. *See United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951) (statute's meaning interpreted in light of the evils at which the legislation was aimed). The statute clearly allows an independent contractor to recover if he can establish that he has been subjected to racial hostility in the workplace. If Wal-Mart believes it should be permitted, as a matter of statutory and constitutional law, to treat its independent contractors in a racially hostile and discriminatory manner during the performance of their contracts, its remedy is with Congress, not this Court. The Petition for Writ of Certiorari should be denied.

III. THERE IS NO CONFLICT IN THE LOWER COURTS OVER WHETHER CORPORATIONS CAN ESTABLISH STANDING TO BRING § 1981 HOSTILE ENVIRONMENT CLAIMS ON BEHALF OF THEIR EMPLOYEES.

Wal-Mart asserts that the eminently personal nature of hostile work environment claims should preclude independent contractors like Danco from asserting them on behalf of an employee like Mr. Guiliani. Wal-Mart's theory

is apparently that the particularized injury necessary for the contracting corporation to have standing cannot be shown in such cases.[9] Wal-Mart's attempts to extrapolate the potential that a corporation may not always be damaged by its employee being subjected to a hostile environment into a reason to review this case, are without merit. The Court of Appeals found that Wal-Mart had waived the right to assert any so-called standing defense, and that Danco had established a sufficient injury for standing in any event. Thus, there are no grounds for this Court to review the decision below.

Nonetheless, Wal-Mart alleges that the Court should grant a Writ of Certiorari to resolve an alleged conflict among the lower courts that is based upon a purported disagreement over the interpretation of certain *dicta* in the Supreme Court decision, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) ("a corporation has no racial identity and cannot be the direct target of discrimination").[10] The relevance of any alleged

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[9] Supreme Court jurisprudence has made it clear that a stamp of minority is not required to complain about racial discrimination and that damages may be indirect and based upon associations. *See, e.g., Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229, 237 (1969); *Barrows v. Jackson,* 346 U.S. 249, 256 (1953) (permitting non-minorities to claim their interactions with minorities instigated discrimination which injured them). Furthermore, Wal-Mart, prior to the Court of Appeals decision upholding a substantial verdict against it, never argued that Mr. Guiliani or Danco did not have standing to pursue their claim, thus conceding that standing is a non-issue.

[10] Notably, Wal-Mart did not consider this alleged conflict over corporate standing to be important enough to present it as a question before this Court. *See* Petition for Writ of Certiorari, at i.

conflict among circuits regarding the standing of a corporations is difficult to discern, and not precisely articulated by Wal-Mart. Nevertheless, a careful review of the allegedly conflicting cases cited by Wal-Mart, reveal that there is no conflict among circuits as to whether a corporation can have standing to claim that it has suffered damages from racial discrimination and pursue a § 1981 claim.[11]

Wal-Mart cites two cases in the District of Columbia Circuit as holding that a plaintiff corporation did not have a racial identity and therefore did not have standing. In *Gersman v. Group Health Ass'n*, 725 F. Supp. 573 (D.D.C. 1989), the district court did find that the corporation was independent of the racial identity of its employees and therefore did not have standing to bring a § 1981 claim. *Id.* at 577. However, the Court of Appeals disapproved of this reasoning and ruled that corporations can have standing to bring § 1981 claims and that the corporation did not need to have a racial identity in any event. *See Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068, *but original adopted on remand*, 975 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994). The Circuit Court concluded that so long as the corporation can suffer an injury from the

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[11] It should be noted that the Court of Appeals cited the *Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991) case as authority for its decision that Danco had standing, without mentioning any conflict among the Circuits on the issue. This is probably because the Court of Appeals, like the Respondent in the case at bar, was unable to discover any true conflict as to whether a corporation may have standing to bring § 1981 claims for discrimination against its employees.

discrimination, it has satisfied the prudential test for standing. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).[12]

Wal-Mart then claims that the case of *Clifton Terrace Assocs. Ltd. v. United Technologies Corp.*, 929 F.2d 714 (D.C. Cir. 1991) further illustrates a conflict. The *Clifton* court states that the plaintiff, a subsidized housing association, was not sufficiently identified with its tenants in order to have standing to make a § 1981 claim on the tenants' behalf. The *Clifton* court reasoned that the tenants, as the direct discrimination victims, could bring their own claims, and that ultimately no matter who brought the claims, no *prima facie* case of discrimination had been made. *Id.* at 722. Thus, any of its statements regarding standing are merely *dicta*. Furthermore, the more recent *Gersman* decision made it clear that corporations can have standing to bring § 1981 claims in the District of Columbia Circuit. *See Gersman v. Group Health Ass'n*, 931 F.2d at 1568.[13]

The final case cited by Wal-Mart purportedly demonstrating a conflict is *Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. 310 (S.D.N.Y 1993). In *Hotel St. George*, the court ruled that a housing association did

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[12] The Court of Appeals in *Gersman* did affirm the lower court's ultimate denial of the corporate plaintiff's claim that its contract was canceled because of its shareholder's religious affiliation, based upon the *Patterson* decision excluding discriminatory termination as grounds for a § 1981 action. *See Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1570 (D.C. Cir. 1991).

[13] The *Clifton* decision was handed down on April 5, 1991 and the *Gersman* Circuit Court decision was handed down on July 5, 1991 by the same court.

not have standing under § 1981 or other civil rights statutes to prosecute the claims of its residents. *Id.* at 318-19. The court noted that this was because a housing provider's interests are too often adverse to that of its residents, who could bring their own claims. *Id.* at 319 n.7.

In the case at bar, Guiliani's and Danco's interests were never adverse. Danco could only act through its owner and employee, Guiliani. *See, e.g., Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982); *T&S Serv. Assocs., Inc. v. Crenson*, 666 F.2d 722, 725 (1st Cir. 1981); *see also Fullilove v. Klutznick*, 448 U.S. 448, 455 (1980) (the Court entertained, without questioning standing, the claims of several associations of minority contractors seeking their set aside rights under 42 U.S.C. § 6701 *et seq.*). Therefore, *Hotel St. George* is inapposite to the case at bar.

Furthermore, although the *Hotel St. George* court did not state this additional reason for the corporation lack of standing, it is apparent from the facts of the case that the plaintiff did not have a contract with the defendants, who were merely community activists, petitioning their government for policy changes. *Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. at 314. Thus, under the plain language of the statute, the Association could not have brought its § 1981 claim, and the discussion of the suitability of the association to prosecute its residents' civil rights cannot support a conflict relevant in the matter before this Court.

The line of cases set forth in Wal-Mart's Petition at 20, which hold that corporations either can have the racial identity of their shareholders or controlling officers or do

not need to have a racial identity to establish standing, so long as they have suffered injury due to their association with racial minorities, are in line with the Court of Appeals decision below. *See also Great American Tool Co. v. Adolph Coors Co., Inc.*, 780 F. Supp. 1354 (D. Colo. 1992) (president and sole shareholder's minority identity was stamped upon corporation and their corporate and individual civil rights claims merged).

The allegedly conflicting cases, cited by Wal-Mart, do not evidence any dissension among the circuits, over whether a corporation may ever sustain a particularized injury that establishes standing in a civil rights action. Furthermore, even Wal-Mart does not suggest that a heightened burden for corporations bringing civil rights claims is proper or that the Court of Appeals decision on this issue was in error. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (stating that in order to establish standing "[a] plaintiff must only allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief"). Moreover, Wal-Mart has never argued to this Court or to any court below that Danco and Mr. Guiliani did not have an actionable § 1981 contract relationship with Wal-Mart. Accordingly, the Court should decline Wal-Mart's request for review.

CONCLUSION

For the foregoing reasons the Respondent respectfully requests that the Court deny Wal-Mart's Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, THE FOOD MARKETING INSTITUTE, AND THE INTERNATIONAL MASS RETAIL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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The Chamber of Commerce of the United States of America, the National Association of Chain Drug Stores, the Food Marketing Institute, and the International Mass Retail Association, having been unable to secure the consent of the respondents, respectively move the Court under Sup. Ct. R. 37.2(b) for leave to file the attached brief *amici curiae* in support of the petition for a writ of certiorari in this case.

The Chamber of Commerce of the United States of America

("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than two and a half million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the American business community. Accordingly, the Chamber has participated as *amicus curiae* in several hundred cases before the Court, including several major employment law cases that have addressed key issues regarding the application of Title VII of the Civil Rights Act of 1964 and other federal statutes. *See, e.g.*, *Kolstad* v. *American Dental Ass'n*, 119 S. Ct. 2118 (1999); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742 (1998); *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133 (1990); and *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986).

The National Association of Chain Drug Stores ("NACDS") is a trade association whose membership consists of 136 retail chain community pharmacy companies. Collectively, chain community pharmacy comprises the largest component of pharmacy practice with over 97,000 pharmacists. The chain community pharmacy industry is comprised of more than 19,000 traditional chain drug stores, 7,000 supermarket pharmacies, and nearly 5,000 mass merchant pharmacies. The NACDS membership base operates more than 31,000 retail community pharmacies with annual sales totaling over $158 billion, including prescription drugs, over-the-counter medications, and health and beauty aids. Chain operated community retail pharmacies fill over 60% of the more than 2.73 billion prescriptions dispensed annually in the United States. Additionally, NACDS membership includes nearly 1,400 suppliers of goods and services to chain community pharmacies. The international membership of NACDS includes 105 members from 26 countries.

The Food Marketing Institute ("FMI") is a nonprofit association whose membership includes some 1,500 food retailers and wholesalers and their customers in the United States and

throughout the world. FMI's activities include programs in research, education, industry relations, and public affairs on behalf of its members and their subsidiaries. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of $225 billion — more than half of all grocery store sales in the United States. The retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets. FMI's international membership includes 200 members from 60 countries.

The International Mass Retail Association ("IMRA") is an alliance of retailers and their product and service suppliers committed to bringing price-competitive value to the world's consumers. IMRA improves its members' businesses by providing industry research and education, government advocacy, and a unique forum for its members to establish relationships, solve problems, and work together for the benefit of the consumer and the mass retail industry. Collectively, IMRA's more than 200 retail companies operate more than 133,000 stores worldwide and have sales of over $450 billion annually. IMRA also represents over 600 supplier companies with sales totaling over $600 billion per year. Together, IMRA's membership represents over $1 trillion in annual sales and employs millions of workers.

As the foregoing demonstrates, the *amici* represent a broad range of commercial and business interests in the United States. Their members regularly do business with independent contractors and other business organizations whose employees may work on their premises. As a result, *amici* have a keen interest in the issue presented by this case. If the First Circuit's decision is permitted to stand, the companies that *amici* represent face a wave of new litigation from businesses claiming that they and/or their employees have been injured as a result of exposure to a hostile work environment. *Amici* believe that such claims are fundamentally inconsistent with the principles of hostile environment liability enunciated by this Court. Nonetheless, if *amici's* members are to be exposed to such claims, at the very

least they should receive timely and definitive guidance from this Court so that they may structure their activities to comply with the law and avoid unnecessary risks of liability.

The attached brief supplements rather than duplicates the petition. It demonstrates that, because the hostile workplace environment theory is designed to protect employees' emotional and mental well-being, attributes typically not possessed by business entities such as independent contractors, Congress could not have intended to spawn the amount and kind of business litigation invited by the First Circuit's construction of 42 U.S.C. § 1981. In addition, the brief documents the tremendous growth over the last decade of "outsourcing" by American businesses of a variety of services that were previously performed in house but are now performed by outside contractors, often with employees working on the premises of the contracting company. *Amici* believe that the discussion of these issues may assist the Court in its disposition of the petition.

For the foregoing reasons, the motion for leave to file the attached brief should be granted.

Respectfully submitted,

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INTRODUCTION AND SUMMARY

The First Circuit's ruling that independent contractors may bring hostile workplace environment claims under 42 U.S.C. § 1981 has a breathtaking sweep. If allowed to stand, that

[1] No counsel for any party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission.

decision will obviously mean that large corporations like the petitioner, which outsource many tasks to independent contractors in diverse fields, will face potential claims of a breadth and peculiarity which they (and we believe Congress) never foresaw. It means as well that small businesses across the nation will be subject to the same claims. It also means that even private individuals, who are not employers or operating a business, may have to defend a claim of hostile workplace environment by independent contractors hired to mow the lawn, rewire the basement, or fix the plumbing. And it means that *any* commercial entity—not just independent contractors as that term is commonly understood—whose employees happen to work for some period on the premises of another, including Fortune 500 corporations, law partnerships, and accounting firms, may bring hostile workplace claims against parties with whom they contract. In short, the decision below "open[s] more expansive vistas of litigation." *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring).

We believe that Congress did not intend, in amending § 1981, to launch the kind of litigation the decision below invites. We make that point in Part I below. In Part II we urge the Court to grant review even though the case comes before it prior to the development of a clear conflict among the circuits over the meaning of § 1981.

ARGUMENT

I. CONGRESS DID NOT INTEND UNDER § 1981 TO CONFER A CAUSE OF ACTION ON BUSINESSES UNDER THE HOSTILE WORKPLACE ENVIRONMENT THEORY.

Hostile workplace environment claims arose first under Title VII of the Civil Rights Act of 1964, which forbids discrimination in the "terms, conditions, or privileges of employment," on the basis of an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). The contours of a hostile workplace claim—what the plaintiff must prove, how a defendant

may defend—have been painstakingly worked out over the years through numerous court cases and agency proceedings. *See, e.g.*, *Knabe* v. *Boury Corp.*, 114 F.3d 407, 410 (3d Cir. 1997). Those precedents, however, will be only marginally relevant to the cascade of litigation heralded by the decision below.

That is because there is a fundamental difference between a hostile work environment claim brought by an employee and one brought by an independent contractor or other business entity. Employees bring hostile work environment claims to redress psychological and emotional injuries. Business enterprises, however, have no emotions to be damaged, and can only recover for economic losses.

1. Courts have always recognized that the essential element of a hostile work environment claim is injury to the human sprit. The first case to recognize a hostile workplace environment theory was *Rogers* v. *EEOC*, 454 F.2d 234 (5th Cir. 1971). *See Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986). *Rogers* involved an action for employment discrimination under Title VII based on the allegation that the employer, a company engaged in optometry, segregated its patients, a practice which aggrieved the employee-claimant. Judge Goldberg wrote that "employees' psychological as well as economic [interests] are statutorily entitled to protection from employer abuse," and that Title VII protects "the emotional and psychological stability of minority group workers." 454 F.2d at 238.

This Court endorsed the view of Title VII as prohibiting a hostile workplace environment in *Meritor*, where it rejected the petitioner's argument that the statute did not reach "'purely psychological aspects of the workplace environment,'" 477 U.S. at 64, and ruled instead that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65.

Subsequent cases have continued to focus on the effect of the alleged discriminatory conduct on the employee's mental well-being and on-the-job attitude. Thus, in *Harris* v. *Forklift Systems,*

Inc., 510 U.S. 17 (1993), while holding that a plaintiff need not prove that the defendants' conduct caused "a tangible psychological injury," the Court also ruled that the plaintiff must demonstrate a work environment "that a reasonable person would find hostile" and that the victim as well "subjectively perceive[s] * * * to be abusive." *Id.* at 21.

Indeed, even the examples given in *Harris* of the kinds of effects short of a psychological breakdown that a hostile environment may produce—diminished job performance, discouragement from staying on the job, and impeded career advancement—reflect adverse psychological impacts stemming principally from the deleterious effects of the hostile environment on the employee's spirit. *Id.* at 22.[2]

Independent contractors and other business organizations, however, have no spirit to be abused and are incapable of experiencing the hallmark indicia of a hostile environment, namely "intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 65; *see also Oncale* v. *Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998). This is not to say that a corporation may never suffer racial discrimination actionable under § 1981; it is only to say that the hostile workplace environment theory of a § 1981 violation, which by definition asserts harm to the human spirit, is not available to a corporation.

It may well be that the *employees* of an independent contractor or other business entity could be intimidated, ridiculed, and insulted by the employees of a second firm with which the former had a contract. Indeed, that is the situation of the case at bar. And, under certain circumstances, such as when the two

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[2] Discrimination that actually kept employees from advancing in their jobs would be a core violation of Title VII, actionable without need for resort to a hostile workplace environment claim. *Cf. Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.")

contracting corporations are treated as a "single employer" or a "joint employer," the employees of the former may have a claim against the second firm under Title VII. *See, e.g., Miller* v. *D.F. Zee's, Inc.*, 31 F. Supp. 2d 792, 805-807 (D. Or. 1998) (citing cases).[3] But those employees have no claim under § 1981, for they have no contract with the second firm. As the First Circuit correctly held in this case, "the employee cannot collect damages on his own behalf" because § 1981 does not provide a claim "to one who is merely *affiliated*—as an owner or employee—with" the independent contractor. Pet. App. 9a-10a.

2. One might offer in response that the "benefits, privileges, terms, and conditions of the contractual relationship" protected against racial discrimination under § 1981 should be read to include a right not to have one's employees subjected to a hostile workplace environment. That is, when the host contracting company's employees racially harass the employees of the visiting contracting company, the latter may sue under § 1981. But that is a big step.

It has been settled at least since *Meritor* that the phrase "terms, conditions or privileges of employment" in Title VII includes the *employee's* right to be free of severe forms of workplace harassment, and it is clear that Congress in amending § 1981 meant for the "'benefits, privileges, terms and conditions of the [*employment*] contractual relationship'" to similarly forbid severe

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[3] Indeed, an "employer" within the meaning of Title VII may be liable for interference with the employment opportunities of individuals it does not directly employ. *See, e.g., Sibley Mem'l Hosp.* v. *Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (persons aggrieved under Title VII may include "individuals who do not stand in a direct employment relationship with an employer"); EEOC Enforcement Guidance 915.002 (Dec. 3, 1997), *reprinted in* EEOC Compl. Man. (CCH) ¶ 2172. Thus, for example, where a firm provides one of its employees to work on site for a client, and the client subjects the employee to discrimination—*e.g.*, requests a replacement employee of a different race—the client may be liable to the employee under Title VII, even though it is not a direct employer. *See id.* ¶ 2172, at 2255, example 6.

racial harassment. *E.g.*, H.R. Rep. No. 102-40(I), at 92-93 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630-31. But it does not follow that Congress also intended to afford business concerns with a new cause of action to be asserted on their own behalf, not on behalf of employees who actually suffer a hostile workplace environment. Rather, given the flood of litigation this new interpretation of § 1981 invites, the novel idea of giving a corporation a cause of action against another based on injury to the spirit of its employees, and the deafening congressional silence on any of these issues, one may reasonably conclude that Congress intended no such thing. *See Chisom* v. *Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[W]e are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history * * *.").

Moreover, this new corporate cause of action will differ in material ways from traditional employment discrimination suits, whether under Title VII or § 1981. In the traditional suit the plaintiff employee acts to vindicate personal rights and seeks remedies that will confer personal rewards—restoration to the job, and/or money damages. But the employee may have no personal interest at all in the corporation's suit, especially if, as will frequently be the case, the employee is no longer working on the defendant's premises. But to prove its case the corporate plaintiff will need the employee's participation and testimony, and may require it regardless of the employee's wishes on the matter. Nor is it farfetched to suggest that the employee may feel pressure from the employer to provide helpful testimony.

In addition, it may be expected that corporate hostile workplace claims under § 1981 will become another weapon in what would otherwise be ordinary commercial breach of contract cases. A corporation sued for failure to perform may seek to excuse the failure as the result of the deleterious effects on its employees of a hostile working environment allegedly inflicted on them by the plaintiff's employees. Or a contractor finding that

excessive costs of performance have reduced its profits may blame those costs on a hostile workplace environment and sue to recover them. In none of these cases will the corporation be driven by the interests of the employees whose alleged suffering is the gravamen of the claim. Moreover, although Congress has acted to protect employees who are under the de facto control and dominance of their employers, it should not lightly be assumed that, in amending § 1981, Congress intended to confer a new federal cause of action in commercial disputes between business enterprises that will regularly be evenly matched.

In sum, the decision below was wrongly decided for the fundamental reason that the hostile workplace environment theory is designed to protect employees' emotional and mental well-being, attributes not possessed by business entities, and Congress could not have intended to spawn the amount and kind of business litigation invited by the First Circuit's construction of § 1981.

II. THE COURT SHOULD RESOLVE THE ISSUE NOW.

This case involves "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Independent contractors play an increasingly important role in the American economy, as both large and small businesses recognize the benefits they can obtain by "outsourcing" tasks that were previously performed by employees in house. Many companies now routinely outsource their requirements concerning payroll and benefits administration, information technology, security, landscaping, custodial and janitorial work, data processing, and cafeteria and food services.

A February 1997 survey by the Bureau of Labor Statistics concluded that about 12.6 million people—one tenth of the American work force—now work in so-called "alternative" arrangements that fall outside the scope of traditional employment relationships. *See* Sharon R. Cohany, *Workers in Alternative Employment Arrangements: A Second Look*, Monthly Lab. Rev.,

Nov. 1998, at 3. This category includes not just traditional self-employed independent contractors, but also on-call workers, workers for temporary help agencies, and workers for "contract companies"—firms that supply workers to another organization under contract.

As of 1996, some 86% of major U.S. corporations outsourced at least some of their services, up from 58% in 1992. John A. Byrne, *Has Outsourcing Gone Too Far?*, Bus. Wk., Apr. 1, 1996, at 26. According to one estimate, by 1996, the outsourcing business had reached $100 billion in size, and was growing by a rate of 20 to 30% a year. *See* Terrence E. Deal & Allan A. Kennedy, *The New Corporate Cultures* 95 (1999). By the year 2000, the size of the industry is expected to reach $282 billion. *Id.* at 96.

There is good reason to believe that these trends will continue into the next century. While not all jobs are equally amenable to outsourcing, businesses have sound economic reasons for outsourcing tasks that are not directly related to their core functions. Outside specialist contractors can frequently provide particular services more efficiently and at a lower cost. *See, e.g.*, James Brian Quinn & Thomas R. Doorley, *Beyond Products: Services-Based Strategy*, Harv. Bus. Rev., Mar.-Apr. 1990, at 58, 65 ("By limiting or shedding activities that provide no strategic advantage, a company can increase the value it delivers to both customers and shareholders and, in the process, lower its costs and investments. Conversely, if a company performs activities that it could buy more effectively, costs tend to balloon, and it loses competitive advantage.").

In short, the application of a hostile work environment theory of discrimination to independent contractors "reach[es] to a problem beyond the academic or the episodic." *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). As we have shown, the First Circuit's decision dramatically alters the legal landscape, potentially exposing businesses to an entirely new category of claims by independent contractors and contract firms. This Court has previously granted *certiorari* to address important

issues relating to workplace harassment under Title VII, even absent a conflict among the circuits. In *Meritor*, for example, the Court granted review to address "important questions concerning claims of workplace 'sexual harassment' brought under Title VII," even though lower courts had uniformly held that such claims were cognizable. 477 U.S. at 59, 66.[4] Sexual harassment became a subject of considerable importance as increasingly large numbers of women entered the work force. The increased reliance by American business on outsourcing and independent contractors is also a development of significant importance, and deserves similar attention from the Court.

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[4] *See also, e.g., Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (reviewing the question whether purely private discrimination could violate 42 U.S.C. § 1982, even though the decision below was the only appellate case to have addressed the issue); *Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968) ("We granted certiorari * * * because the issue is important in the administration of the bankruptcy laws and is one of first impression in this Court."); *American Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964) ("The question being an important one of first impression under the [Labor Management Reporting and Disclosure Act], we granted certiorari."); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 396-97 (1940) ("In view of the importance of the question, which appears to be one of first impression in the application of the copyright law, we granted certiorari.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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REPLY

BRIEF

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IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

DANCO, INC. AND BENJAMIN GUILIANI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

After two rounds of briefing, the petition plainly satisfies the customary criteria for granting review. It concerns "an important question of federal law" that has not been decided by this Court. S. Ct. R. 10(c). It implicates a "conflict" in the lower courts regarding the standing of corporations to bring § 1981 and similar claims on behalf of their employees. S. Ct. R. 10(a). And it addresses a question that is recurring in nature, affects a wide range of commercial enterprises and in the end demands prompt resolution—as suggested by the petition and now confirmed by the brief *amici curiae* filed by the United States Chamber of Commerce, the National Association of Drug Stores, The Food Marketing Institute and the International Mass Retail Association. While respondents understandably try to offer several arguments to the contrary, none counters these essential, and we respectfully submit dispositive, points.

1. At no point do respondents raise, or even hint at, a procedural obstacle to reviewing the question presented. Nor could they. From the initial filing of this case to the present, petitioner has been steadfast in contending that 42 U.S.C. § 1981 does not permit independent contractors, as opposed to employees, to bring hostile work environment claims.

2. Respondents also conspicuously fail to rebut the argument (Pet. 21-23) that this federal issue is an important one. Whether one considers the vantage point of large businesses or small ones, sophisticated independent contractors or unsophisticated ones, all have a stake in this issue and all stand to benefit from guidance regarding the appropriate resolution of it. As the *amici curiae* brief filed by the United States Chamber of Commerce, among others, also makes clear, few if any businesses have structured their workplace rules to handle such independent contractor, as opposed to employee, claims.

> [L]arge corporations . . . , which outsource many tasks to independent contractors in diverse fields, will face

> potential claims of a breadth and peculiarity which they (and we believe Congress) never foresaw. . . . [S]mall businesses across the nation will be subject to the same claims. . . . [E]ven private individuals, who are not employers or operating a business, may have to defend a claim of hostile workplace environment by independent contractors hired to mow the lawn, rewire the basement, or fix the plumbing. And it means that *any* commercial entity—not just independent contractors as that term is commonly understood—whose employees happen to work for some period on the premises of another, including Fortune 500 corporations, law partnerships, and accounting firms, may bring hostile workplace claims against parties with whom they contract.

Amici Curiae Br. 1-2. Add to this the large number of workers who identify themselves as independent contractors, at 6.7% and growing (*see* Pet. 22; *Amici Curiae* Br. 7-8), and it becomes clear that the national significance of the issue by itself warrants review.

3. Respondents start their opposition brief unconventionally with § 1981's "legislative history," arguing (Resp. 4) that it "is important to understanding why the Court of Appeals' decision was correct and need not be reviewed." Even the broadest conception of this interpretive tool, however, has never supplied an explanation for sidestepping review of a lower-court decision. Nor at any rate does the legislative history begin to do what respondents say it does. It fails to show that Congress as a collective body, or even as represented by one individual member, thought that the 1991 amendments to § 1981 would apply to hostile-workplace claims brought by independent contractors. Indeed, the reports and floor speeches all suggest the opposite. Time after time, they repeat that the 1991 amendments extend the statute to hostile-workplace claims brought by "employees" while saying not a word about doing the same for independent contractors.

(Pet. 14-15). Respondents also fail to offer any explanation why Congress would make such a significant change in the law without "mention[ing] it at some point in the unusually extensive legislative history." *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991).

Instead of arguing that the National Legislature took up this specific issue during its statutory deliberations, respondents primarily claim that the general goals of the 1991 amendments cover this previously-unheard-of discrimination, proposing (Resp. 4) that the congressional record reveals that "the purpose" of § 1981 is "to protect *all persons* from racial discrimination." But this sort of attribution of congressional intent stretches the law, to say nothing of statutory interpretation, to the breaking point. It is difficult to believe that any such characterization of congressional purpose, even if it existed, could ever so transform a statute. Because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998), "generalized references to the 'remedial purposes' of the [statute] will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." *Aaron v. SEC*, 446 U.S. 680, 695 (1980) (quotations and citations omitted).

4. Also unpersuasive is the contention (Resp. 5-6) that the 1991 amendments, because they respond to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), must have been designed to reach these claims. But by extending an employee-related theory of liability (hostile-workplace claims) to § 1981 and by doing so through the employee-centric terms of Title VII, Congress did no such thing. One does not adopt an expanded theory of liability by "borrow[ing] terms" from a self-confining statute, which should "be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

See Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 152 (1987) (a statute patterned after a separate, pre-existing provision carries the limitations of the borrowed statute with it).

5. For like reasons, respondents' fleeting references (Resp. 9-11) to the language of § 1981 undermine rather than advance their cause. The terms of the statute say nothing about hostile work environment claims by independent contractors. And the only reason § 1981 has any application to hostile-workplace claims at all stems from the importation of Title VII terminology into the provision, a linguistic heritage that as shown considerably shortens rather than lengthens the statute's reach. Respondents simply do not come to terms with this point, and nowhere respond to the authority cited in the petition (Pet. 10-11) that supports it.

6. Nor do respondents satisfactorily explain (Resp. 15-17) why the time-honored distinction between independent contractors and employees does not point in the same direction. It is no response simply so say (Resp. 16) that, if true, this means that "independent contractors are unprotected by all of § 1981." Respondents know better. Independent contractors may bring claims for improper termination of a contract on grounds of race discrimination, and in point of fact that is just what respondents did in this case. Rather, the tradition of "differential treatment" between employees and independent contractors, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721-22 (1996), of which Congress was fully aware in 1991 and long before (Pet. 13-14), amplifies why Congress would not lightly conflate an employee-centered theory of legal liability with independent contractor status. In overlooking these long-recognized distinctions, respondents fail to deal with the fact that it is the subordinate nature of an employee's relationship with an employer and the employee's lack of independence that are the very enabling features that allow a hostile work environment to exist.

7. Far from "leav[ing] all independent contractors vulnerable to racial discrimination in their workplaces without recourse" (Resp. 17), this reading respects the language that Congress enacted while leaving intact an ample variety of race-discrimination remedies. Consider the options still available to independent contractors: (1) Under § 1981, they may still seek relief for improper termination of the contract, as respondents did here; (2) under Title VII, they may still seek relief when the necessary qualities of control exist between the two businesses (*see* Pet. 19), such that they are independent contractors in name but employees in fact and therefore eligible to vindicate their employee rights to "emotional and psychological stability" in the workplace, *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971); and (3) under State law, they may still seek relief under a spectrum of civil and criminal laws designed precisely to remedy such harassment. Only a dysfunctional marriage of independent contractors and hostile-workplace claims is removed with this reading, a development as consistent with the language of the statute as with common sense.

8. Respondents offer no rejoinder to the contention (Pet. 16) that their interpretation, if accepted, would raise serious Thirteenth Amendment questions—namely, whether § 1981 could still fairly be characterized as legitimate enforcement legislation under this broad application, particularly as applied to corporations and other independent contractors that most assuredly were not the beneficiaries of the Thirteenth Amendment. This extension of § 1981, by itself, warrants review. *See United Brotherhood of Carpenters and Joiners of Am. v. Anderson*, 119 S. Ct. 1495 (granting petition on question of constitutional authority for § 1981), *cert. dismissed*, 119 S. Ct. 2418 (1999); Pet. 16-17.

9. Nor do respondents offer any meaningful assurances about the administration of this sudden innovation, to say nothing of quieting concerns about the litigation-driven

confusion that will spring from it. Except to say that the application of § 1981 to *employee* hostile-workplace claims has not created problems (Resp. 18), they offer no explanation how the elements and defenses of a hostile-workplace claim will apply in the unique setting of a non-controlling, non-subordinate relationship. For example, they do not explain how corporate claimants will be able to show that a work environment is *objectively* hostile because it involves "an environment that a reasonable person would find hostile or abusive," *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993), or is *subjectively* hostile because the victim "perceive[s] the environment to be abusive," *id.* at 21-22. They do not explain how this theory will ever cover individual claimants, who either will not be the contracting party (as here) or will already have a Title VII claim available to them if the kind of control and subordinate status that make a workplace actionable are found to exist. *See generally Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). And they do not explain how the defenses to this theory—the existence of meaningful preventive and corrective procedures (*see* Pet. 17-18)—could ever realistically apply to corporate or individual defendants, who until now have never had reason to make their workplace rules and complaint procedures available to every vendor with whom they do business. The currency of hostile-workplace inquiries simply does not readily convert, if it converts at all, to the independent-contractor setting.

10. Respondents do no better in trying (Resp. 20-25) to explain away the lower-court confusion over a corporation's standing to assert such claims. *See* Pet. 19-21. Respondents initially say (Resp. 21 n.9) that the question was a "non-issue" below, which is not quite true and irrelevant to boot. Wal-Mart did challenge standing in its petition for rehearing, which after all was the first occasion it had to respond to a court of appeals' interpretation that itself raised many of these issues. At all events, standing questions may be raised at any stage in the litigation, indeed even after briefing and on the eve of oral

argument. *See, e.g., Vermont Agency of Natural Resources v. United States, ex rel. Stevens*, No. 98-1828, 1999 WL 1045146 (U.S. Nov. 19, 1999). *See also National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) (standing is "a jurisdictional requirement which remains open to review at all stages of the litigation").

Nor do respondents dispel the confusion that has arisen on this issue—first and foremost because a statement from this Court on the point has not been disavowed. "[A] corporation," the Court has said unequivocally, "has no racial identity and cannot be the direct target of . . . racial discrimination." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). Even the lower courts that have disagreed with this view have expressed unease in doing so—with one saying, for example, that the "argument that corporations cannot be subjected to slavery and cannot have races and thus cannot be covered by the Thirteenth Amendment and § 1981 has a good deal of force." *Howard Sec. Servs. v. Johns Hopkins Hosp.*, 516 F. Supp. 508, 512-13 (D. Md. 1981). Many of the other lower courts failing to follow *Village of Arlington Heights* have articulated distinct grounds, and tests, for doing so. In *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir. 1982), the Second Circuit concluded that the plaintiff had a racial identity because the non-profit corporation had "the very purpose of advancing minority interests, whereas for [the *Arlington Heights* corporation] this was simply an incidental, although important, by-product." *Id.* at 706. Yet other courts have recognized a racial identity, and § 1981 standing, because of the race of the company's owner or its management. *See e.g., Rosales v. AT&T Info. Sys., Inc.*, 702 F. Supp. 1489, 1494 (D. Colo. 1988); *Howard*, 516 F. Supp. at 513; *T & S Serv. Assocs. v. Crenson*, 505 F. Supp. 938, 943 (D.R.I.), *vacated on other grounds*, 666 F.2d 711 (1st Cir. 1981).

While it should be enough to show a conflict warranting review that the First Circuit's decision diverges from *Village of Arlington Heights*, respondents fail to rebut the showing that the conflict is more extensive than that. Respondents simply mischaracterize *Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. 310, 318-19 & n. 7 (S.D.N.Y. 1993), which clearly held that plaintiff could not assert the rights of its residents under § 1981 because "a litigant must assert his own legal rights and interests." (Citation and quotation omitted). And *Clifton Terrace Assocs., Ltd. v. United Tech. Corp.*, 929 F.2d 714, 721 (D.C. Cir. 1991), concluded that § 1981 standing was available only for the "direct victims" of discrimination, namely the tenants of the housing complex, not the corporation that owned it. While the court ultimately considered the case of the tenants and found that they had not made out a *prima facie* case, *id.* at 722, that hardly makes the court's necessary preliminary decision "*dicta*." (*See* Resp. 23). Removing any doubt on this score while simultaneously disposing of respondents' claim that the D.C. Circuit now supports the First Circuit's view, *see Gersman v. Group Health Ass'n*, 931 F.2d 1565 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *reinstated*, 975 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994), a later decision of the circuit has continued to embrace *Clifton Terrace*. *See Fair Employment Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1278-80 & n. 4 (D.C. Cir. 1994).

Respondents also err in making the aside (Resp. 21 n. 9) that the Court has already resolved the problem at hand. *Barrows v. Jackson*, 346 U.S. 249 (1953), was not a § 1981 case, and simply allowed a plaintiff to proceed on a theory of third-party standing in challenging a restrictive covenant. And *Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229 (1969), involved a § 1982 plaintiff who was actually a party to the contract at issue and accordingly suffered his own injury. In the final analysis, the inter-court confusion, together with the failure of

many courts to follow *Village of Arlington Heights*, warrants immediate review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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